Petition

81-1051

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No._____.

In the Supreme Court of the United States

OCTOBER TERM, 1981

JOHN H. WEAVER,
Petitioner

v.

G. ROGER BOWERS, GEORGE M. METZGER, and JOSEPH F. CATANIA, Individually and as members of the Board of Commissioners of Bucks County

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where the District Court entered judgment for petitioner because he was discharged in January, 1976 solely because of his political party affiliation in violation of his First Amendment Rights, and where the defendant County Commissioners waived the defense that *Elrod vs. Burns,* 427 U.S. 347 (1976) should not be applied retroactively, was it error to reverse the District Court's judgment on the basis of "evenhandedness" because the suit of another county employee was dismissed when this defense was raised timely.

2. Was the Court of Appeals without subject matter jurisdiction to hear and decide this case where the defendants appealed more than thirty days after the District Court's Orders granting petitioner's post trial motions and denying defendants' post trial motions to amend the court's judgment?

3. Should *Elrod vs. Burns, supra,* be applied retroactively because it involves fundamental First Amendment rights and because it does not meet the *Chevron Oil Co. vs. Huson,* 404 U.S. 97 (1971) test for nonretroactivity?

4. Where petitioner was rehired as a result of the District Court's judgment pending the outcome of this appeal, is petitioner a prevailing party, and was it error to deny petitioner attorney's fees pursuant to 42 United States Code §1988?

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Petition

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN H. WEAVER,
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G. ROGER BOWERS, GEORGE M. METZGER, and JOSEPH F. CATANIA, Individually and as members of the Board of Commissioners of Bucks County

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, JOHN H. WEAVER, prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Third Circuit rendered in these proceedings on September 8, 1981.

THE OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 657 F. 2d 1356 (1981) and appears herein as Appendix F. The Opinions of the United States District Court for the Eastern District of Pennsylvania (Weiner, J.) are not reported. They appear herein as follows:

Opinion of May 17, 1979 - Appendix A
Opinion of November 27, 1979 - Appendix C
Opinion of November 27, 1979 - Appendix D
Opinion of January 17, 1980 - Appendix E

With respect to the related case of *Marino vs. Bowers, et al,* the Opinion of the United States court of Appeals for the Third Circuit is reported at 657 F.2d 1363 (1981) and appears herein as Appendix H. The Opinion of the United States District Court for the Eastern District of Pennsylvania (Luongo, J.) is reported at 483 F. Supp. 765 (1980) and appears herein as Appendix G.

JURISDICTION

(i) The judgment of the U.S. Court of Appeals for the Third Circuit which is sought to be reviewed was entered on September 8, 1981. See Appendix F, *infra.* This petition for certiorari was filed within ninety (90) days from the date of the aforesaid judgment.

(ii) On September 22, 1981 petitioner filed a request for rehearing which was denied by the U.S. Court of Appeals for the Third Circuit by Order entered on October 13, 1981. There has been no Order granting an extension of time within which to file a petition for certiorari.

(iii) Jurisdiction to review the judgment of the U.S. Court of Appeals for the Third Circuit by writ of certiorari is conferred on this Court by Title 28 of the United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

1. The following provisions of the *Constitution of the United States* are involved:

   Amendment I
   Amendment XIV

2. The following statutory provisions are involved:

   42 U.S.C. §1983
   42 U.S.C. §1985
   42 U.S.C. §1986
   42 U.S.C. §1988

3. The following provisions of the *Federal Rules of Civil Procedure* are involved:

   Rules 6, 52(b), 59(b) and (e).

4. The following provisions of the *Federal Rules of Appellate Procedure* are involved:

   Rule 4(a)

The full text of these Amendments to the Constitution, Statutes and Rules are set forth in Appendix J which is attached hereto.

STATEMENT OF THE CASE

Plaintiff John H. Weaver filed this Civil Rights action in the U.S. District Court for the Eastern District of Pennsylvania for reinstatement and back pay because he was fired from his job as a park superintendent in Bucks County, Pa. solely because of his political party affiliation. The District Court had jurisdiction pursuant to Section 1343 of Title 28 of the United States Code to hear plaintiff's claim.

John H. Weaver is a United States citizen and a resident of Bensalem Township, Bucks County, Pa. He is a registered Democrat and active in local Democratic party politics. (R. 9(a))[1]. Defendants were the incumbent Bucks County, Pa. Commissioners who were elected to the County Board of Commissioners in November, 1975.[2]

In 1972 Weaver was hired by the Bucks County Board of Commissioners as a park superintendent for Bucks County's Core Creek Park. (R. 12(a)). This job was non-tenured, non-union, non-civil service and non-confidential. Although Weaver held the title of "park superintendent" his job was merely that of a maintenance

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[1] "R" references are to the reproduced record filed by appellees/defendants in the U.S. Court of Appeals for the Third Circuit. "Appendix" references are to the Appendix attached to this Petition.

[2] Bucks County is a County of the Third Class and is governed by a three person "Board of Commissioners". The Board exercises both legislative and executive powers and is responsible for hiring and terminating county employees. (R. 75(a)). Also see generally, Act of Aug. 9, 1955, P.L. 323, §§501-521, Title 16 Purdons Pa. Statutes Annotated §§501-521.

None of the defendant commissioners remain in office. They have been succeeded by Commissioners Elaine P. Zettick (R), Andrew L. Warren (R) and Carl F. Fonash (D). Rule 25 (d) of the *Federal Rules of Civil Procedure* provides for their automatic substitution as parties in this lawsuit in their official capacity as County Commissioners.

foreman. He was responsible for supervising 4 to 11 workers who cut the grass, cleaned the toilets and kept maintenance equipment in good repair. (R. 13(a)-16(a)). Weaver's immediate supervisor was the maintenance manager Joseph Marino who was also a Democrat.[3] (R. 18 (a)).

In November, 1975 Democrat Joseph F. Catania and Republicans G. Roger Bowers and George M. Metzger won election to the Board of Commissioners which gave the Republican Party majority control of the County government. (R. 1(a), 5(a)).

The defendant Commissioners were sworn into office on January 3, 1976. On January 22, 1976 defendants Bowers and Metzger voted to fire plaintiff John H. Weaver along with more than a dozen other Democratic employees without regard to standard personnel procedures, prior notice, cause or hearing. (R. 31(a)). Marino was similarly fired on February 10, 1976.[4] (R. 190(a)). Bowers and Metzger voted to replace Weaver and Marino with two men who were active political supporters of defendant G. Roger Bowers. (R. 72(a)-73(a), 99(a)-103(a)).

John H. Weaver's suit against the then incumbent County Commissioners charged that Weaver was a non-policy making county employee and that the defendant Commissioners terminated his employment solely because of his political party affiliation in violation of his rights of free speech and due process as guaranteed by the 1st and

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[3]The organizational structure of the Bucks County Department of Parks and Recreation is depicted on plaintiff's Exhibit P-2. The Department was headed by Director Ronald Chase. (R. 17(a)-19(a)).

[4]Also see *Marino vs. G. Roger Bowers, et al,* 80-1395, 657 F.2d 1363, (Third Circ. (1981)). (Appendix H.)

14th Amendments of the United States Constitution. Plaintiff alleged causes of action under 42 U.S.C. 1983, 1985, 1986 and 1988. (R. 1(a)-3(a)). Defendants answered by asserting that Weaver held a policy making position and by denying that Weaver was fired because of his political party affiliation. (R. 4(a)-6(a)). *The defendants raised no other defenses in any pleading or in any pretrial or trial motion.*

In April, 1979 this case was tried to the court sitting without a jury. On May 17, 1979 the trial court entered judgment for the plaintiff. The trial court found that Weaver held a non-policy making job and that defendants terminated his employment solely by reason of his political party affiliation. The trial court applied this Court's decision in *Elrod vs. Burns,* 427 U.S. 347, 96 S. Ct. 2673 (1976) and ordered Weaver reinstated but declined to make an award of back pay or attorney's fees. (Appendix A).

On May 29, 1979 Weaver filed timely post trial motions to amend and modify the court's judgment to include back pay and attorney's fees.[6] Defendants did not file any post trial motions on or before May 29, 1979.[7]

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[6]Ordinarily post trial motions to amend or modify a judgment must be filed within 10 days from the date of judgment. Rules 52(b), 59(b), and (e) of the F.R.C.P. This time period may not be enlarged. Rule 6(b) of the F.R.C.P. Here, May 27, 1979 was a Sunday and May 28, 1979 was Monday, Memorial Day. Hence, Tuesday, May 29, 1979 was the last day for either Weaver or the defendants to file timely post trial motions with respect to the trial court's judgment of May 17, 1979. Rule 6(a) of the F.R.C.P.

[7]On June 6, 1979 defendants filed an appeal to the United States Court of Appeals for the Third Circuit even though the time for filing an appeal was extended by plaintiff's timely post trial motions. See Rule 4(a) of the Federal Rules of Appellate Procedure. On October 12, 1979 the Court of Appeals remanded defendants' appeal and directed the trial court to dispose of all pending motions.

Statement Of The Case

Nicholas Marino filed suit against the County Commissioners in July, 1979 three months after the District Court entered judgment for Weaver. Marino's suit was dismissed upon defendants' Motion for Summary Judgment. See *Marino vs. G. Roger Bowers, et al,* 79-2419 (E.D. Pa., Jan. 31, 1980); 483 F. Supp. 765, Aff'd. 657 F.2d 1363 (3d Cir. Sept. 8, 1981). (Appendices G & H.)

On August 7, 1979, defendants filed a motion with the trial court requesting a stay of its May 17, 1979 Order, dismissal of plaintiff's post trial motions, and for leave to allow defendants to file *untimely* post trial motions. On August 13, 1979, without any authority, defendants filed what they styled "exceptions" to the trial court's factual findings and judgment of May 17, 1979. No "exceptions" were taken at this time with respect to the retroactivity of *Elrod vs. Burns, supra,* nor with respect to the defense of governmental immunity.

On October 18, 1979 defendants again filed "exceptions" which were virtually identical to those filed on August 13, 1979.

On November 1, 1979 the trial court denied all of defendants' motions and exceptions. (Appendix B). On November 27, 1979 the trial court granted Weaver's post trial motions and awarded Weaver back pay and attorney's fees. (See Appendices C & D).

Defendants did not appeal the District Court's orders of November 1 and November 27, 1979. Rather, on December 6, 1979 defendants filed a third set of post trial "exceptions" which raised for the first time the question of *Elrod's* retroactivity and defendants' immunity.[8]

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[8]It is not clear whether these were intended as "exceptions" to the Court's post trial orders of November 1 and November 27, 1979 or the Court's judgment of May 17, 1979.

On January 17, 1980 the trial Court ruled on defendants' third set of "exceptions". The Court ruled that defendants "exceptions" were untimely because they were filed more than six months after the District Court's judgment of May 17, 1979; that the defendants waived the defenses of *Elrod's* nonretroactivity and governmental immunity by not raising these questions and defenses earlier. The trial court also granted Weaver additional back pay and attorney's fees to the date he was rehired in November, 1979. (Appendix E).

Defendants filed an appeal with the U.S. Court of Appeals for the Third Circuit on January 30, 1980 which was 91 days from the trial court's order of November 1, 1979 denying defendants' post trial exceptions, and 63 days from the trial court's Order of November 27, 1979 granting plaintiffs' post trial motions. At no time did the defendants ask the trial court for an extension of time to file a late appeal. See Rule 4(a) of the Federal Rules of Appellate Procedure.

On September 19, 1980 the appeal was considered by a panel of the U.S. Court of Appeals for the Third Circuit composed of Justices Gibbons, Weis and Sloviter without oral argument.

In January, 1981 the matter was directed for rehearing before the Court in banc where oral argument was held on May 11, 1981. On September 8, 1981 the U.S. Court of Appeals for the Third Circuit issued a written opinion reversing the trial court's judgment of January 17, 1980 and assessing costs upon defendants. Justice Sloviter wrote the majority opinion. Judges Gibbons and Weis dissented. (Appendix F).

In its opinion, the Court of Appeals found sufficient

evidence in the record to sustain the trial court's finding that Weaver was a non-policy making employee who was dismissed because of his political affiliation. (Appendix F, p. 27a). The Court of Appeals acknowledged the trial court's finding that the defendants' post trial "exceptions" were not timely. It also held that the question of *Elrod's* retroactivity was a defense which could be waived if not raised before or at trial, *that this defense was waived by the defendants, and that the defendants did not have a justifiable excuse for their failure to raise the defense in a timely manner.* Thus, the Court of Appeals sustained the trial court's decision with respect to the sufficiency of the record and the legal questions involved below and on appeal.[9] However, on September 8, 1981 the Court of Appeals also rendered its decision in the related case of *Marino vs. Bowers, supra.* In *Marino,* where the question of *Elrod's* retroactivity was timely raised, the court concluded that *Elrod* should not be applied retroactively. Based upon its opinion in *Marino,* and without any precedent or authority, the Court of Appeals ruled that on the basis of "the most fundamental jurisdictional concerns, evenhandedness in the administration of justice", it was constrained to reach the untimely question of *Elrod's* retroactivity in this case and reverse the judgment of the trial court. The Court added the extraordinary caveat that it may have reached a different result had Weaver's case reached the court "before the decision in *Marino* or at some other time under some other circumstances". (Appendix F, pg. 33a).

On September 22, 1981 Weaver filed a Petition for Rehearing. The Petition maintained that the Court of Ap-

[9] The Court of Appeals did not decide the question of governmental immunity.

peals did not have jurisdiction to hear and decide the appeal because the defendants' appeal was untimely in that it was filed more than 30 days after the trial court denied and granted post trial motions on November 1 and November 27, 1979. The Court of Appeals, by order filed October 13, 1981, denied this Petition for Rehearing. (Appendix I).

Weaver filed this Petition for Writ of Certiorari on December 7, 1981 within the time prescribed by statute (90 days) to seek review of the opinion and judgment of the U.S. Court of Appeals for the Third Circuit of September 8, 1981.

THIS COURT SHOULD ISSUE A WRIT CERTIORARI BECAUSE THE DECISION OF THE COURT OF APPEALS SUBSTANTIALLY DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL REVIEW.

I.

It is difficult to conceive of a judicial decision which is more patently erroneous and unjust than the decision of the Court of Appeals in this case. The judgment of the Court of Appeals cries out for review and reversal because it has no basis in law and is without precedent or reason.

The Court should review the decision below because the Court of Appeals reversed the trial court's judgment even though it found that the trial court was correct with respect to the facts and the law of the case. The Court of Appeals considered a defense which it held was waived by the defendants without finding extraordinary circumstances or equities. The Court of Appeals coined a new rule of law, that of "evenhandedness", and unfairly held that because the suit of another county employee[10] was dismissed where the defendant commissioners timely raised the defense that *Elrod v. Burns,* 427 U.S. 347, 96 S. Ct. 2673, (1976) should be nonretroactive, Weaver should suffer the same fate even though the defense was not timely raised in his case.

The Court of Appeals failed to acknowledge the fundamental procedural differences between the *Marino* and *Weaver* cases. Instead, it based its decision upon what it viewed as the public's perception of justice, admitting that its decision may have been different if Weaver's case was not heard together with Marino's. It is submitted that the Court of Appeals' decision, under these circumstances,

[10] See *Marino vs. Bowers,* 483 F. Supp. 765 (Third Circ. 1980).

denied Weaver due process at the appellate level and that this case should be reviewed by the Supreme Court because the decision below runs far afoul of commonly accepted principles of justice and fairness.

It should be clear from a reading of the majority opinion of the Third Circuit in *Weaver v. Bowers* (Appendix F), that Weaver prevailed on the merits of his case. The Court of Appeals held that the trial court was correct in finding that Weaver was discharged from his non-policy making job solely because of his political party affiliation; and that this was a violation of his rights of free speech as protected by the First Amendment to the United States Constitution if *Elrod v. Burns, supra,* was applicable. The Court of Appeals also held that the trial court was correct when it ruled that the defendants waived the defense of *Elrod's* nonretroactivity and that the defendants had no excuse for failing to raise the defense in a timely manner. It is submitted that a litigant can do no more for his cause than to convince a Court that he is entitled to judgment because he is correct with respect to both the facts and the law. Nevertheless, the Court of Appeals overlooked and ignored this most fundamental principle. Instead, the Court of Appeals looked to its decision in *Marino v. Bowers,* (Appendix H) and held on principles of "evenhandedness", that because it refused to apply *Elrod* retroactively in the *Marino* case, it should do the same with respect to Weaver. The Court of Appeals recognized the often stated principle that it should not consider questions which were not preserved at the trial level except under extraordinary circumstances. But it failed to explain or cite any circumstances present in the *Weaver* case which would warrant its avoidance of this long standing rule. Nor, for that matter, did the defendants ever argue that "extraordinary circumstances" were present which would

justify the Court of Appeals' consideration of the question of *Elrod's* nonretroactivity. The Court of Appeals could not cite even one equity in favor of the county commissioners which would justify its avoidance of the rule of waiver other than the fact that Weaver was rehired pending the appeal. It defies logic why this should be considered an equity where the commissioners were simply complying with the lower court's order having failed to obtain a stay or supersedeas.

The Court of Appeals explained that the result it reached was necessary because of the "fundamental principles of evenhandedness". Of course, "evenhandedness" of justice is a lofty principle we all strive for. However, coextensive and similar to "evenhandedness" are the principles of stare decisis and rule of law. In this instance, the law of waiver is well settled in policy and precedent. And while the law, at times, sets forth exceptions to well settled rules, it does so on the basis of logic, reason and common sense and not mere general statements. The Court of Appeals' reversal on the basis of "evenhandedness" violates the very principle it seeks to uphold. The Court of Appeals applied this so-called principle of "evenhandedness" to Weaver without citing any authority or precedent. The principle of "evenhandedness" was not even argued or urged upon the Court by the defendants. Clearly, the Court's application and analysis of the law was not evenhanded with respect to Weaver.

The inconsistency of the Court of Appeals' majority opinion is apparent when one considers the equities which the Court of Appeals said it was fostering by not applying *Elrod* retroactively. The majority reasoned that *Elrod* should not be applied retroactively because it would be unjust to the county commissioners because they could not have expected the Supreme Court's decision in *Elrod*. Yet,

with respect to Weaver, the Court, in fact, applied two newly enunciated principles of law retroactively which Weaver could not anticipate. First, the majority allowed the defendants to raise the principle of *Elrod's* nonretroactivity and to apply the defense *retroactively* with respect to Weaver. Second, the majority applied the principle of "evenhandedness" to reach the same result as in the *Marino* case which could not have been anticipated by Weaver since Marino filed suit after Weaver won judgment.

The Court explained that its decision was based, in part, upon its understanding of the public's perception of justice. It is submitted that the Court of Appeals, in rendering a judgment with respect to individual litigants, should never bend to the mercy of public opinion. It is submitted that our constitution envisions a system of justice which is designed to protect an individual's rights no matter how unpopular that decision may be with the populace. Members of the Court are sworn to obey and enforce the Constitution of the United States without regard to public opinion polls. The Court of Appeals clearly failed in this regard. Moreover, the Court gave little credit to the public and the legal community for their ability to accept differing results in cases which have similar underlying facts but which are prosecuted and defended differently. The county commissioners slept on their rights in the *Weaver* case but asserted their rights in the *Marino* case. The public has no difficulty accepting different results where two plaintiffs are injured in an accident and one sues before the statute of limitations expires, but the other waits until the statute has run. This is not a difficult concept to understand and certainly is no reason to reverse the trial court's judgment.

It is submitted that the public's perception of justice

is harmed rather than strengthened by the Court's handling of the *Weaver* case. It appears obvious that the Court rendered its decision without regards to the merits of the case but only with regards to the results. The Court showed little concern for the working man but great concern for municipal defendants who wield great political power. The Court's decision in Weaver only tends to support the public view that these county commissioners were above the law and that they could violate an individual's constitutional rights with impunity and ignore court rules without sanctions.

Lastly, the Court of Appeals should have considered other remedies if it was disturbed by the results which would follow from a retroactive application of *Elrod* in this case. If the Court of Appeals was concerned about giving Weaver a windfall it should have considered awarding Weaver his job without back pay. If it was concerned about an injustice to the defendants or the county it could have remanded the case to the trial court for inquiry as to any actual hardship which would result from Weaver's hiring.[12] These alternatives would certainly have been more appropriate considering the courts overriding concern for fairness and "evenhandedness".

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[12] See Footnote 14 *infra*

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS REFUSED TO DISMISS THE APPEAL FOR LACK OF SUBJECT-MATTER JURISDICTION BECAUSE IT WAS UNTIMELY, WHICH WAS PLAINLY CONTRARY TO THIS COURTS DECISION IN *BROWDER VS. DIRECTOR, DEPT. OF CORRECTION OF ILLINOIS.*

II.

The Court of Appeals should have dismissed the appeal taken by the defendant commissioners because the appeal was not timely. It is now axiomatic that the timeliness of an appeal is a jurisdictional question and that unless an appeal is timely filed, an appellate court is without jurisdiction to hear the case. This rule is mandatory and the question of a court's subject matter jurisdiction cannot be waived. An appellate court has the duty to inquire as to its subject matter jurisdiction whenever the question is presented. *Browder v. Director, Department of Correction of Illinois,* 98 S. Ct. 556, 434 U.S. 266 (1978). Before this case, this rule of law was scrupulously followed by the Third Circuit. See *Merrell - National Labor, Inc. v. Zenith Labor, Inc.,* 579 F.2d 786 (1978, C.A. 3).

Here the defendants extraordinary post trial maneuvers tended to mask and conceal from view the fact that their appeal was filed beyond the thirty day appeal period.

The trial court rendered its judgment on May 17, 1979. Plaintiff filed timely post trial motions which operated to postpone the time within which an appeal could be taken. See Rule 4(a) of the Federal Rules of Appellate Procedure. The defendants did not file any post trial motions within ten

days of the court's judgment as required by Rules 52(b) and 59 of the Federal Rules of Civil Procedure.

On November 1, 1979 the trial court dismissed defendants' untimely "exceptions" and on November 27, 1979 the trial court granted plaintiff's post trial motions. Pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure, a party is required to file an appeal within thirty days of the trial court's order either granting or denying the parties post trial motions. See *Browder v. Director, Department of Correction of Illinois, supra.* If we are generous with our interpretation of the Rule, defendants were required to file an appeal no later than thirty days following the court's order of November 27, 1979 granting plaintiff's post trial motion. Yet defendants did not appeal until January 30, 1980.

Defendants could not unilaterally enlarge the appeal period by filing post trial "exceptions" on December 6, 1979. If these "exceptions" were to the court's judgment of May 17, 1979, or even the court's order of November 1, 1979, they were clearly too late. If they related to the court's orders of either November 1, 1979 or November 27, 1979 they were filed without any authority whatsoever. The Federal Rules of Civil Procedure do not authorize the filing of post trial motions to orders granting or denying post trial motions. The reason for this is obvious. If such "exceptions" were allowed, a party could prolong indefinitely the applicable appeal period by filing an indefinite number of post trial motions to orders denying or granting post trial motions. This procedure would be absurd.

Weaver raised this jurisdictional question in his Petition for Rehearing to the U. S. Court of Appeals. The appeal's court refused to review the question even after the Supreme Court's decision in *Browder* and the Third Circuit's decision in *Merrell* were brought to its attention. It is submitted that by failing to address this issue, the Court of

Appeals has ignored the jurisdictional principles expressed by this court in *Browder,* and that this is reason for the court to exercise its discretion and issue a writ of certiorari to review the judgment of the Court of Appeals.

THE COURT SHOULD DECIDE WHETHER *ELROD VS. BURNS* SHOULD BE APPLIED RETROACTIVELY BECAUSE THE DECISION PROTECTS FUNDAMENTAL FIRST AMENDMENT RIGHTS AND DOES NOT MEET THE *CHEVRON OIL CO.* TEST FOR NON-RETROACTIVITY.

III.

The Supreme Court should issue a writ of certiorari to review this case because the majority opinion of the Court of Appeals raises confusion and creates doubt as to when decisions of the Supreme Court which pass upon fundamental civil rights should be applied retroactively. This Court has indicated in at least two recent decisions where it has decided questions involving certain fundamental constitutional rights that such decisions should be applied retroactively. Yet the Court of Appeals for the Third Circuit in *Weaver* and *Marino,* like the First Circuit in *Aufiero v. Clark,* 639 F.2d 49 (1981) and the Fourth Circuit in *Ramey v. Harbor,* 589 F.2d 753 (1978, Cert. denied) have held that *Elrod* should not be applied retroactively according to their analysis of *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). These Courts have carved out an exception to the general rule of retroactivity for *Elrod* type cases which we believe was not intended by the Supreme Court and which exception does not meet the *Chevron* test for nonretroactivity.

A. The Court of Appeals refused to apply *Owen v. City of Independence, Illinois* which would require *Elrod to be applied retroactively.*

In *Owen v. City of Independence, Illinois,* 445 U.S. 622 (1980), 100 S. Ct. 1398, the Supreme Court indicated without reservation that in cases of wrongful discharge from public employment, municipal defendants, and not the affected employee, should bare the risk of new constitutional developments. In *Owen,* the city council fired its police chief without a hearing amidst allegations of wrongdoing. Two months later the Supreme Court ruled in *Board of Regents v. Roth,* 408 U.S. 564 (1972) that a government employee who is allegedly stigmatized in the course of his discharge is entitled to a name clearing hearing. The Court of Appeals for the Eighth Circuit sustained the trial court's judgment that the city council was entitled to the defense of good faith immunity because it should not have been required to anticipate the Supreme Court's decision in *Roth.* The Supreme Court reversed and held that *Roth* should have been applied retroactively. This Court rejected the argument that the city council could base a good faith immunity defense upon its understanding of constitutional law at the time of the plaintiff's discharge. This Court explained that the essential aim of the Civil Rights Act of 1871, the forerunner of §1983, was to protect persons wronged by the miss-use of power by persons in positions of authority. Justice Brennan, who delivered the opinion of the Court in *Owen,* concluded:

> "Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable cost of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have

been violated."
(100 S. Ct. at p. 1417).

The significance of the majority's opinion in *Owen* did not go unnoticed by the Court's dissenters. Justice Powell, with whom the Chief Justice and Justices Stuart and Renquist joined dissenting, stated:

> "The Court today holds that the City of Independence may be liable in damages for violating a constitutional right that was unknown when the events in this case occurred."
> (100 S. Ct. at p. 1419).

The Third Circuit in *Marino*[11] read *Owen* narrowly and without regard to the Supreme Court's rational for holding that municipalities are not entitled to good faith immunity in §1983 cases. The Court of Appeals refused to follow the Supreme Court's direction in *Owen* and stated simply that:

> "Where, as here, the application of all the *Chevron* factors point to nonretroactivity, we are unwilling to hold to the contrary based on one sentence of a Supreme Court opinion in a different context."
> (Appendix H, p. 60a.)

Clearly, the context of the two cases is very similar. See Justice Weis' comments and analysis of *Owen* in his dissenting opinion to *Marino*. (Appendix H, p. 72a.)

It is submitted that *Owen's* constitutional rights to a due process "name clearing hearing" are no more worthy of retroactive protection than Weaver's rights of free speech and free association which were recognized in *Elrod*.

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[11]The question of *Elrod's* retroactivity was briefed and argued in both *Marino* and *Weaver*. The Third Circuit's analysis of *Elrod's* retroactivity is set forth in the *Marino* opinion (Appendix H) which analysis was adopted and applied in *Weaver* (Appendix E).

In *Bradley v. School Board of City of Richmond,* 94 S. Ct. 2006, 416 U.S. 714 (1974), a school desegregation case, this Court held that a Court is bound to apply the law in effect at the time it renders its decision unless doing so would result in "manifest injustice" or there is statutory direction or legislative history to the contrary. (94 S. Ct. at p. 2016). In the instant case, the Court of Appeals did not and could not cite a "manifest injustice" which would result if *Elrod* was applied retroactively.

The Third Circuit Court of Appeals in a sex discrimination context follows the rule that it is required to apply the law in effect at the time of its decision. See *Zichy v. City of Philadelphia,* 590 F.2d 503 (1979) and 559 F.2d 1210 (1977) where the Third Circuit applied the Supreme Court's intervening decisions in *General Electric v. Gilbert,* 429 U.S. 125, 97 S. Ct. 401, (1976) and *Nashville Gas Co. v. Satty,* 434 U.S. 136, 98 S. Ct. 347 (1977).

There is no public policy reason why new constitutional pronouncements of the Supreme Court should be applied retroactively in cases involving discharge of public employees without a name clearing hearing, sex discrimination or race discrimination, but not retroactive in cases involving constitutional rights of free speech and free association, as exercised by public employees. It is submitted that this is a question which deserves review and clarification by the Supreme Court.

B. The Third Circuit departed significantly from the *Chevron* nonretroactivity test.

The Third Circuit's decisions in *Weaver* and *Marino,* together with the Fourth Circuit's decision in *Ramey* and the First Circuit's decision in *Aufiero,* depart significantly from the Supreme Court's test for nonretroactivity as enunciated in *Chevron Oil Co. v. Huson, supra.* In *Chevron,* the Supreme Court ruled that in determining

whether a decision should be applied retroactively a Court should consider three factors:

1. Does the decision to be applied nonretroactively establish new principles of law and was it not clearly foreshadowed?
2. Will retroactivity promote or hinder the newly pronounced substantive rule?
3. If the new decision is applied retroactively, will it produce substantial inequitable result, hardship or injustice.

The Third Circuit Court of Appeals in *Weaver,* per its analysis in *Marino* which followed the *Ramey* and *Aufiero* Courts, concluded that *Elrod* was not foreseeable nor clearly foreshadowed and that it therefore met *Chevron's* first test for nonretroactivity. This analysis is difficult to accept intellectually considering prior decisions of the Supreme Court which not only foreshadowed but broadcast to public officials that it would be a violation of the First Amendment to the United States Constitution to discharge public employees solely on the basis of their political affiliations.

In *Keyishian v. Board of Regents,* 385 U.S. 589 (1966) a faculty member of a state university was threatened with discharge because he refused to comply with a state regulation which required state employees to certify that they were not members of the communist party. The Supreme Court held that mere membership in the communist party "is not a constitutionally adequate basis" for denying public employment. In *Elfbrandt v. Russell,* 384 U.S. 12 (1965) the State of Arizona required its employees to take an oath denying membership in the communist party or any organization advocating the overthrow of the state government. The Supreme Court held that such conditions

of public employment unconstitutionally threatened our "cherished freedom of association" protected by the First and Fourteenth Amendments to the United States Constitution.

Based upon this Court's decisions in *Keyishian* and *Elfbrandt* it would be fair to say that in January, 1976, when defendants terminated Weaver, that it was unconstitutional to condition public employment or to discharge a public employee solely because he or she was a member of the communist party or a subversive organization. It would therefore take a rather myopic and narrowminded public official, after consulting with legal counsel and being advised of the Supreme Court's decisions in *Keyishian* and *Elfbrandt,* to believe that he could fire a non-public employee because he was a Democrat, but not another public employee because he was a communist or member of a subversive group.

The Third Circuit Court of Appeals in *Marino* and *Weaver,* like other appellate courts which have considered the question, concluded that *Elrod* met the third *Chevron* test for nonretroactivity believing that retroactivity would likely produce substantial inequitable results. This aspect of the lower Court's decision requires review by the Supreme Court for at least two reasons. First, because if we balance the equities, it should be obvious that municipal defendants would suffer minimally while the wrongfully discharged employee would suffer greatly. See *Owen v. City of Independence, Illinois, supra;* also see Judge Weis' dissenting opinion in *Marino v. Bowers.* (Appendix H,p.72a.)Second, the appellate courts which have considered this third prong of the *Chevron* test have looked to potential inequities in the abstract without regard to the facts of the particular case. *Chevron* requires an inquiry as to the resulting equities or injustices present *in the*

particular case being reviewed. This is crucial with respect to the *Weaver* decision. When Weaver was rehired in November, 1979, in compliance with the trial Court's Order of May 17, 1979 which was not stayed, his rehiring did not cause any inequities or hardship to the county or to the individual defendants. In fact, the employee he replaced was transferred to an existing vacancy in another department without financial loss to the county or to the employee involved.[12]

Because the Court of Appeals considered only abstract equitable considerations without regards to the particular facts of this case, and because the First and Fourth Circuits also applied *Chevron* in the abstract, this Court should grant certiorari and rule on the question. Further, and with respect to Weaver, this Court should consider that the Court of Appeals erred by failing to remand the case to the trial court for a factual determination as to whether or not an actual hardship or injustice will be suffered if *Elrod* were applied retroactively with respect to *Weaver.*

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[12] Unfortunately, because the county commissioners did not raise the retroactivity issue at trial, Weaver did not put on the record facts to show that the county, the county commissioners, and other county employees did not suffer any hardship or inequities when Weaver was rehired. Weaver would have presented such evidence had the question been presented at trial.

There is a subsidiary question involved here. *Chevron* requires an examination of the equities vis-a-vis the parties to the lawsuit. Here, the *Weaver* defendants would clearly suffer no hardship at all since they are not longer in office, and because their jobs were not affected. It is not clear from *Chevron* that we should consider the equities or inequities imposed upon non-parties to this suit.

THIS COURT SHOULD DECIDE WHEN A PARTY IN CIVIL RIGHTS LITIGATION IS A "PREVAILING PARTY" SO AS TO BE ENTITLED TO ATTORNEY'S FEES WHICH IS A NOVEL QUESTION.

IV.

The Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. §1988, permits a Court to award attorney's fees to the prevailing party in civil rights litigation. In this case, Weaver was the prevailing party at the trial court level. Following the District Court's judgment of May 17, 1979 the defendants refused to rehire Weaver pending consideration of Weaver's post trial motions even though there was no stay of proceedings. Weaver's motion for contempt was withdrawn when the defendants agreed to rehire him pending the outcome of these appeals.[13] Consequently, and solely as a result of this litigation, Weaver has held his job since November 26, 1979 and there can be no question that in this regard he has prevailed. Further, and but for the retroactivity question which was untimely raised by the defendants on appeal, there can be no question that Weaver would have prevailed on the underlying merits of his case.

The trial court exercised its discretion and awarded Weaver attorney's fees in its Order of November 27, 1979 and its supplemental Order of January 17, 1980. The Court of Appeals reversed the District Court's judgment of January 17, 1980 but ultimately awarded Weaver costs

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[13] These matters are not reflected in the appendix nor in the reproduced record. They are, however, reflected in various motions and answers to motions which are a part of the original record.

without attorney's fees.[14] Thus, the Court of Appeals did not consider Weaver to be a prevailing party even though he now holds his job solely as a result of this pending litigation.

This Court should address the question as to whether a party is entitled to attorney's fees where he prevails, at least temporarily, with respect to the merits of his case. And especially where the trial court awards attorney's fees to the then prevailing party and where the Court of Appeals sustains the trial court's judgment on the merits but reverses under the extraordinary facts of this case. This is a novel question and has never been addressed by this Court.

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[14] Interestingly, the Court of Appeals did not expressly order Weaver discharged, only that it was reversing the judgment of the trial court of January 17, 1980. In this regard, the Court of Appeals was careful to avoid addressing the Court's earlier orders and judgments which were not timely appealed. Hence, Weaver is still entitled to his job since there was no express reversal of the trial court's judgments of May 17, 1979 or its Orders of November 1, 1979 and November 27, 1979.

CONCLUSION

V.

Petitioner, John H. Weaver, requests this Honorable Court to grant a writ of certiorari to review this case because the decision of the U. S. Court of Appeals for the Third Circuit substantially departs from accepted and usual course of judicial and appellate review in its unprecedented application of "evenhandedness" in *Weaver* after sustaining the decision of the trial court in all other respects; because the Court of Appeals failed to dismiss the appeal for lack of jurisdiction because it was untimely, which was in conflict with the decision of this Court in the *Browder v. Director, Dept. of Correction of Illinois, supra;* because the Court of Appeals has ruled that this Court's decision in *Elrod v. Burns, supra,* should not be applied retroactively, which appears to be in conflict with this Court's decision in *Owen v. City of Independence, Illinois, supra* but which this Court has not expressly ruled upon; and lastly, because the Court of Appeals has ruled that Weaver is not entitled to attorney's fees even though he has prevailed temporarily which is a novel question.

Respectfully submitted,
RONALD J. SMOLOW, ESQUIRE
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Ronald J. Smolow, Esquire, Attorney for Petitioner, do hereby certify that three copies of Petitioner's Petition for Writ of Certiorari and Appendix were served by United States mail, postage prepaid, first class on December 4, 1981 address to David H. Moskowitz, Suite 414, One Oxford Valley, Langhorne, Pa. 19047. I further certify that all parties required to be served in this appeal have been served.

RONALD J. SMOLOW, ESQUIRE
Attorney for Petitioner

Appendix A

APPENDIX A

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED MAY 17, 1979.

WEAVER v. BOWERS, METZGER and CATANIA
(C.A. NO. 77-3927)

John H. Weaver, Plaintiff,

v.

G. Roger Bowers, George M. Metzger
and Joseph F. Catania, Defendants,
Individually and as members of
the Board of Commissioners of Bucks County

MEMORANDUM, OPINION AND ORDER

Weiner, J. May 17, 1979

Plaintiff brought this suit in equity against the defendants, members of the Board of Commissioners of Bucks County. His complaint alleges that he was discharged solely for the reasons that he was a member of the Democratic Party. He seeks injunctive and other relief for violations of the First and Fourteenth Amendments and 42 U.S.C. §§1983, 1985, 1986, 1988. The case was tried to the Court sitting without a jury.

In March 1972, the plaintiff, a registered Democrat, active in party politics, was hired as a park superintendent for

the Core Creek Park by the Bucks County Board of Commissioners, which at the time was comprised of two Democrats and one Republican. He was a non-civil-service employee and was not covered by any law or regulation protecting him from arbitrary discharge. As park superintendent, plaintiff was under the maintenance and construction division of the Department of Parks and Recreation. Plaintiff's supervisor was the maintenance manager, who, from 1974 through 1976, was Nicholas Marino. Marino supervised plaintiff and evaluated his work. Plaintiff never received any complaints from Marino about his work. Plaintiff supervised between four and eleven people, whose principal responsibility was to cut grass, maintain lawn equipment, and to clean the comfort stations. Plaintiff's position as park superintendent was a non-policy making job. Plaintiff had no power to hire or fire anyone; he could not initiate any new programs; he could not issue park permits; he had no secretary or office staff. Plaintiff was the equivalent of a foreman, but was excused from wearing the work clothes which other foremen wore.

In the beginning of November, 1975, two Republicans and one Democrat were elected to the Board of Commissioners of Bucks County, to take office on or about January 3, 1976.

It had been the practice and custom of the Board of Commissioners that whenever there was a change in the political structure of the Board, it would replace non-civil-service, non-union employees of Bucks County with new employees affiliated with the majority party. Shortly after the November 1975 election of the new Board, Ronald Chase, the Director of the Department of Parks and Recreation, wrote plaintiff a memorandum reprimanding plaintiff for leaving the park early on November 14, 1975.

Plaintiff's explanation was that he went to get parts for park vehicles. Plaintiff previously left the park early for auto parts without being criticized. All performance evaluation reports in plaintiff's work file show that plaintiff was a good or very good employee.

On January 22, 1976, defendants took action to fire plaintiff from his job. Plaintiff received no advance warning of the firing. Mr. Chase told him he was fired because of new people who came in after the election. Plaintiff applied for unemployment compensation. On his affidavit for unemployment assistance, plaintiff stated that the reason for his separation from employment was "political". Plaintiff thereafter received unemployment benefits. No reasons for termination in written form were in plaintiff's work file or in plaintiff's personnel file. From the date of plaintiff's employment as park superintendent in March 1972 until his termination in January 1976, plaintiff remained a good employee, was not subject to any discipline or reprimand by his superiors other than the memorandum of November 17, 1975, from Mr. Chase, and performed in a good manner the work and duties required of him.

The practice of dismissing public employees for partisan reasons is one form of the general practice of political patronage. The constitutionality of such practice was decided in the case of *Elrod v. Burns,* 427 U.S. 347 (1976). There, the Sheriff of Cook County, a Republican, was replaced by a Democrat. It had been the practice of the Sheriff when he assumed office from a Sheriff of a different political party to replace non-civil-service employees of the Sheriff's office with members of his own party when the existing employees lacked or failed to obtain support from, or fail to affiliate with, that party. The Court stated that the cost of the prac-

tice of patronage is the restraint it places on freedoms of belief and association. "An individual who is a member of the out-party maintains affiliation with his own party at the risk of losing his job. He works for the election of his party's candidates and espouses its policies at the same risk". *Id.* at 355. The Court stated:

> "Our concern with the impact of patronage on political belief and association does not occur in the abstract, for political belief and association constitute the core of those activities protected by the First Amendment." *Id.* at 356.

Defendants' contentions that plaintiff's employment was at will and could be terminated without cause, or that if showing cause is necessary, defendants had cause to dismiss the plaintiff are without merit. Employees may always be discharged for good cause, such as subordination or poor job performance, when those bases in fact exist. *Id.* at 366. There is no evidence in this case of poor job performance or subordination on the part of the plaintiff. The only adverse comment in plaintiff's entire performance evaluation reports contained in his work file was the letter of November 14, 1975 concerning his leaving the park early on one day, for which he appeared to have a justifiable excuse.

Defendants further contend that even if plaintiff has shown that his dismissal was politically motivated, defendants could terminate his employment because plaintiff was a policy-making employee. We disagree. The testimony clearly indicates that plaintiff was not a policy-making employee. He was nothing more than a glorified foreman, notwithstanding his job title of park superintendent. His direct supervisor was the maintenance manager. Plaintiff had no power to hire or fire anyone; he could only follow instructions given to him, but could not initiate

any new programs. Policy was set by the Executive Director of the Department of Parks and Recreation, or by the Assistant Director, and was carried out by the maintenance manager through his subordinates, one of which was the plaintiff. It is interesting to note that Exhibit P2, introduced into evidence at trial, is a chart of the Department of Parks and Recreation which lists four sections under maintenance and construction. The first section is "Lower End" listing "Foreman" and "Grdsm"; the second section is "Core Creek" listing "Supt" and "Grdsm"; the third section is "Upper End" listing "Foreman" and "Grdsm"; and the final section is "Peace Valley" listing "Supt" and "Grdsm". Plaintiff was superintendent at "Core Creek", and it is apparent from the table of organization of the Department of Parks and Recreation that plaintiff was in effect the foreman for the groundsmen who work there. No evidence was submitted at trial to prove otherwise. By limiting patronage dismissals to policy-making positions is sufficient to insure that the representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. *Id* at 367, 372.

The *Elrod case, supra,* held that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments.

Since all of the evidence in this case points to the inescapable conclusion that plaintiff's employment was terminated because of his political affiliation only, we find in favor of the plaintiff against all defendants. No evidence having been introduced by plaintiff to substantiate his claim for lost wages, we can make no finding concerning same.

Appendix A

In accordance with Rule 52a, the above memorandum opinion constitutes this Court's findings of fact and conclusions of law.

ORDER

Judgment is entered in favor of the plaintiff and against the defendants, and the defendants are ordered to immediately hire the plaintiff at the same or similar position and salary which he had at the time of termination, with all of the rights and privileges of seniority which he would have had if the termination had not taken place.

IT IS SO ORDERED.

S/_____

Charles R. Weiner

Appendix B

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA OF NOVEMBER 1, 1979 DENYING DEFENDANTS' POST TRIAL MOTIONS.

WEAVER v. BOWERS
(C.A. NO. 77-3927)

ORDER

WEINER, J., November 1, 1979

All motions which have been filed by the defendants since the date of trial are DENIED.

A rule is hereby granted upon the defendants to show cause why they should not be held in contempt for failing to comply with this Court's Order of May 17, 1979 directing defendants to immediately rehire plaintiff.

A show cause hearing has been scheduled for Tuesday, November 13, 1979, at 9:30 a.m., in Courtroom 6B, United States Courthouse, 6th and Market Streets, Philadelphia, Pennsylvania.

S/
Charles R. Weiner

APPENDIX C

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED NOVEMBER 27, 1979 AWARDING PLAINTIFF BACK PAY.

WEAVER v. BOWERS, METZGER, CATANIA
(C.A. NO. 77-3927)

OPINION AND ORDER

WEINER, J., November 26, 1979

On May 17, 1979, we entered an Order directing the defendants to rehire the plantiff because his discharge had been politically motivated. At that time we had not granted the plaintiff back pay because additional information had to be submitted to the Court. The plaintiff has filed a Post-Trial Motion requesting that we amend the judgment and grant back pay to the plaintiff.

Plaintiff calculates his lost wages from Bucks County as follows:

1976	$12,747.68
1977	15,369.00
1978	16,000.00
1979 (to July 23)	9,477.87
TOTAL	$53,494.55

Appendix C

Plaintiff has submitted tax returns for the years 1976, 1977, 1978 indicating that plaintiff earned the following income from employment other than from Bucks County:

1976	$4,679.66
1977	3,178.00
1978	1,517.00
10 weeks unemployment compensation	1,250.00
1979 (to July 23)	2,589.30
TOTAL	$13,213.96

Plaintiff therefore requests that he be awarded the sum of $40,280.59 ($53,494.55 less $13,213.96).

Defendants have failed in their answer to plaintiff's motion and in their memorandum, to refute any of the amounts claimed by plaintiff as lost earnings from Bucks County, and wages earned from sources other than Bucks County. We therefore grant plaintiff's motion for lost wages.

ORDER

The motion of the plaintiff for back pay is GRANTED.

Judgment is entered in favor of the plaintiff and against the defendants in the amount of $40,280.59.

IT IS SO ORDERED.

S/ _____
Charles R. Weiner

APPENDIX D

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED ON NOVEMBER 27, 1979 AWARDING PLAINTIFF ATTORNEYS FEES

WEAVER v. BOWERS, METZGER, CATANIA (C.A. NO. 77-3927)

MEMORANDUM, OPINION AND ORDER

WEINER, J., November 26, 1979

Plaintiff instituted this action against the defendants alleging that he was discharged as Park Superintendent solely for the reason that he was a member of the Democratic Party. He alleged violations of 42 U.S.C. §1983, 1985, 1986, 1988. After trial, judgment was entered in favor of the plaintiff, and defendants were ordered to immediately hire the plaintiff at the same or similar position and salary.[1]

Presently before the Court is the motion of plaintiff's counsel[2] Ronald J. Smolow, for attorney's fees, expenses and costs, pursuant to 42 U.S.C. §1988. The act authorizes the award of reasonable attorney's fees to prevailing parties

[1] See Opinion and Order dated May 17, 1979.

[2] The original motion was filed on May 29, 1979, for fees and expenses in the total amount of $12,320.20. On July 30, 1979, he filed a supplemental motion requesting an additional amount of $3,661.63 for fees and expenses from May 29, 1979, to July 23, 1979, or a total of $15,981.83.

in actions brought under 42 U.S.C. §§1983, 1985 and 1986. Counsel requests attorney's fees, expenses and costs in the total amount of $15,981.83 for the period to and including July 23, 1979. He alleges he expended a total of 191 1/4 hours representing the plaintiff, and he requests payment of $75.00 per hour, the sum of $14,343.76. He claims he expended for costs the total sum of $1,638.07.

The defendants oppose the motion on the grounds that "the instant case is not one of first impression nor does it involve a minority plaintiff but rather it was a case where plaintiff has applied the precedent of *Elrod v. Burns,* 427 U.S. 347, 49 L. Ed 547".

In the alternative, the defendants contend that if we find that plaintiff is entitled to attorney's fees, plaintiff is not entitled to the amount demanded. Defendants contend that the cause of action is not novel; that most of the work could have been done, and probably was done, by junior associates, secretaries or law clerks who are not entitled to the hourly rate which counsel requests. Further that counsel provided no statement that $75.00 per hour is the prevailing rate for an attorney with his experience and background in this area. Lastly, defendants argue that plaintiff did not prevail because we did not award him the back pay which he requested.

The first issue which we shall address is whether the plaintiff was the prevailing party. The law is well settled that we must examine the substance of the outcome of the litigation to determine whether the plaintiff prevailed. We ordered the defendants to immediately rehire the plaintiff because we found he had been discharged solely because of his political affiliation. The fact that we did not at that time order that he be paid any back wages does not alter the fact that plaintiff was the prevailing party.

Having determined that the plaintiff prevailed, we must now calculate the "lodestar"[3] as the next step in computing reasonable attorney's fees.

In his motions, plaintiff attached exhibits setting forth the dates, times and types of activities covered, such as correspondence, phone calls, research, preparation of pleadings, etc. In reviewing each of the activities and times itemized, we find many to be overstated. One glaring overstatement is set forth by plaintiff as "6/24/79 1/2 hr. correspondence to Judge Weiner requesting conference." That letter could be dictated in just a few minutes. In fact, most of the itemized times for correspondence are each stated at 1/4 hour. We cannot accept such apparent time-fixing.

Examples are:

"4/26	Correspondence re: first set of interrogatories	1/4 hr.
7/17	Correspondence to plaintiff re: pretrial conference	1/4 hr.
	Correspondence to defendants' counsel re: depositions	1/4 hr.
8/15	Correspondence to plaintiff re: Bower's deposition	1/4 hr."

[3]Calculation of the lodestar involves determining the number of compensable hours and multiplying those hours by a reasonable hourly rate. For a more detailed explanation of the procedure involved in determining reasonable attorneys' fees, attention is directed to the following cases:

Lindy Brothers Builders of Philadelphia v. American Radiator and Standard Sanitary Corp., 540 F. 2d 102 (3d Cir. 1976) (en banc) (Lindy II); *Lindy Brothers Builders of Philadelphia v. American Radiator And Standard Sanitary Corp.*, 487 F. 2d 161 (3d Cir. 1973) (Lindy I); *Merola v. Atlantic Richfield Co.*, 515 F. 2d 165 (3d Cir. 1975) (Merola II); *Merola v. Atlantic Richfield Co.*, 493 F. 2d 292 (3d Cir. 1974) (Merola I).

The same is true of most of the phone calls itemized by plaintiff. They are claimed to have taken 1/4 hour each.

Examples are:

"9/15	Phone call with E. Rudolph re: trial date & discovery	1/4 hr.
10/4	Phone call with E. Rudolph re: deposition of Metzger	1/4 hr.
11/10	Phone call with Rudolph re: deposition	1/4 hr."

The glaring exactness of time, 1/4 hour, for each of the phone calls cannot be accepted. There is apparent over-statement of time spent by plaintiff. The total time alleged by plaintiff exceeds the amount of time which could have been reasonably expended to pursue the plaintiff's claims.

The defendants dispute the reasonableness of counsel's hourly charge, claiming that he failed to provide any statement that a charge of $75.00 per hour is the prevailing rate for an attorney with his level of experience and background. We believe that this case warrants a fee of $75.00 per hour. That figure is a reasonable and average hourly rate for attorneys who have practiced before this court. Plaintiff's counsel worked on this case alone (his affidavit is silent as to any other person having worked on the case). The itemized time charges required his personal attention.

It is our opinion that a reasonable fee for the efforts by plaintiff's counsel in this case is the sum of $13,200.00 (176 hours at $75.00 per hour). That figure represents the lodestar.

We must now determine whether the lodestar should

be adjusted for exceptional circumstances, by considering the contingent nature of the case and the quality of counsel's work. *Lindy, supra.* In his petition, plaintiff's counsel does not ask us to adjust the "lodestar", he asks for the full amount. A review of the contingency factor involved in this case and the quality of counsel's work compels us to conclude that no adjustment is warranted. Every case handled by an attorney on a contingent fee basis involves the possibility that the case may not be won, and therefore the attorney will receive no fee. It is only where the contingency is so exceptional that a supplementing of the basis recovery is required. This case did not include an exceptional contingent nature. The *Elrod* case had already been decided by the United States Supreme Court, and the facts of this case closely paralleled *Elrod.*

With regard to the quality of counsel's work, the hourly rate which we approved presumed services of high quality. Only when the services rendered are so distinguished as to surpass excellence should the lodestar be increased. Counsel's services were not of this rare quality.

Counsel requests reimbursement of expenses totalling $1,638.07. Included in the itemization is $11.45 for postage and $12.75 for parking. These shall not be allowed. Counsel ignores the cost of doing business in calculating his expenses. Postage and parking fees are part of the cost of doing business, and are included in the total fee which is being awarded to him. The charge of approximately $400.00 for transcripts will not be allowed. We can approve only expenses which have been paid, not conjectured expenses. We will therefore award to counsel the sum of $1,213.87 for reimbursement of expenses.

Appendix D

ORDER

The motion of Ronald J. Smolow, Esq. for attorney's fees, expenses and costs is GRANTED.

Ronald J. Smolow, Esq. is awarded attorney's fees in the amount of $13,200.00 and the sum of $1,213.87 for reimbursement of expenses.

IT IS SO ORDERED.

S/_____

Charles R. Weiner

APPENDIX E

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JANUARY 17, 1980 DENYING DEFENDANTS' EXCEPTIONS AND GRANTING PLAINTIFF SUPPLEMENTAL BACK PAY AND ATTORNEY'S FEES.

WEAVER v. BOWERS, METZGER, CATANIA
Individually, and as members of
the Board of Commissioners of Bucks County
(C.A. NO. 77-3927)

MEMORANDUM, OPINION AND ORDER
WEINER, J., January 17, 1980

Plaintiff, a discharged Park Superintendent, instituted this action alleging that the sole reason for his discharge was his membership in the Democratic Party. He based his claim upon the First and Fourteenth Amendments, the Civil Rights Act, 42 U.S.C. §1983, 1985, 1986, 1988, and the Supreme Court's decision in *Elrod v. Burns,* 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed 2nd 547 (1976). The case was tried to the Court, sitting without a jury, and on May 17, 1979, we entered judgment in favor of the plaintiff and against the defendants.

Presented to the Court are the defendants' Post Trial Exceptions, in the form of a motion to amend and modify

the judgment, and plaintiff's motion to amend and supplement the judgment. For the reasons stated below, we deny the motion of the defendants, and grant the motion of the plaintiff.

DEFENDANTS' POST TRIAL EXCEPTIONS

The defendants have raised two arguments in their post trial exceptions. The first is that this Court erred in relying upon the Supreme Court's decision in *Elrod v. Burns,* Id., because that case is to be given prospective effect only. *Raggio v. Matunis, et al,* C.A. No. 76-3132 (E.D. Pa. Nov. 5, 1979). The defendants note that the act of which the plaintiff complained occurred on January 30, 1976, while the *Elrod* case was decided on June 28, 1976.

The second argument is that our rulings violate the doctrine of governmental immunity afforded to the defendants by the Constitution of the United States, citing, *Atcherson v. Siebenmann,* 605 F. 2d 1058 (8th Cir. 1979); *Eckero v. Indian River School District,* 475 F. Supp. 1350 (D. Del. 1979).

It is unnecessary for us to make a finding regarding the two issues raised. Plaintiff instituted this case on November 15, 1977, well after the Supreme Court decided the *Elrod* case. Between the time plaintiff filed this case, and the time the defendants filed the instant post trial exceptions,[1] a number of courts addressed the issue of the retroactive application of *Elrod.* A short review of those cases reveals that the defendants should have been alerted to raise that issue either in their answer to the complaint, or in a pleading during the course of the pre-trial proceedings. Their failure to timely raise the issue stops them from raising it at this late date.

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[1] December 6, 1979.

Appendix E

The issue of the retroactive application of *Elrod* was discussed in the case of *Litwhiler v. Hilday et al,* 429 F. Supp. 984 (M.D. 1977), where, in its April 14, 1977 opinion, the court determined against retroactive application. We note that that opinion was issued seven months prior to the filing of this suit. Similarly, on April 24, 1978, in the case of *Gibney v. Deaver,* C.A. No. 76-1663, (E.D. Pa. filed April 4, 1978), Judge Hannum reached the same conclusion. Though the latter case was decided after the filing of plaintiff's complaint, the opinion was issued more than one year prior to the trial of this case.

In another case, *Rosenthal v. Rizzo, et al,* 555 F. 2nd 390 (3rd Cir. 1977), decided on May 25, 1977, the court, in reversing and remanding an order granting summary judgment in favor of the defendants, had occasion to discuss the *Elrod* case. Though the court made no pronouncement regarding the retroactive application of *Elrod,* one court in this district has held that the mere discussion of *Elrod* by the Court of Apeals was an implied acquescence for retroactive application. *See, Retail Clerks International v. Leonard,* 450 F. Suppl. 663 (E.D. Pa. 1978). However, that view was not accepted by Judge Cahn in *Raggio v. Matunis, et al, supra.*

The point of our discussion is that in view of the number of cases that previously dealt with this issue, the defendants must be estopped from raising this new defensive theory well after the trial. Indeed we find it curious that the defendants raise this issue only after being unsuccessful in their other attempts to avoid compliance with the orders of this court.[2] We shall not permit this dilatory tactic.

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[2] It should be noted that on November 1, 1979, we were forced to issue upon the defendants a rule to show cause why they should not be held in contempt for failing to comply with this court's order of 5/17/79, directing the defendants to immediately rehire the plaintiff.

One other point which should be made is that motions to amend the judgment must be served not later than ten (10) days after the entry of judgment. Fed. R. Civ. Pr. 59 (e). The defendants' motion was filed and served almost seven months after the entry of judgment.

PLAINTIFF'S MOTION TO AMEND AND SUPPLEMENT THE JUDGMENT

The essence of plaintiff's motion is that our orders of November 26, 1979, granting plaintiff's post trial motions for back pay and attorney's fees, expenses and costs, covered the period up to and including July 23, 1979, but since the defendants failed to rehire the plaintiff until November 26, 1979, an award for additional back pay and attorney's fees must be made. In support of the motion, plaintiff's counsel has submitted an exhibit and affidavit setting forth the additional hours spent in representing the plaintiff from July 23, 1979, to November 26, 1979, and the appropriate calculation for the loss of back pay based upon the 19 week period and a salary of $323.75 per week. The defendants have opposed the motion on the grounds that *Elrod* is not to be applied retroactively, and that our November 26, 1979 orders adequately compensated plaintiff for any loss and reimbursed plaintiff's counsel for attorney's fees.

Having previously addressed the *Elrod* argument, the only issue facing us is whether our prior orders provided adequate and complete relief. We hold that an additional award of back pay and attorney's fees must be made. Our May 17, 1979 order, entering judgment in favor of the plaintiff clearly stated the defendants' responsibilities. The order stated that the defendants are to "immediately hire the plaintiff at the same or similar position and salary

..., with all of the rights and privileges of seniority ... [as] if the termination had not taken place." In failing to rehire the plaintiff until November 26, 1979, the defendants further damaged him to the extent of lost wages during the July 23, 1979 — November 26, 1979 period. Accordingly, the defendants shall be ordered to pay the plaintiff $5,827.50, which is the back pay lost during the 18 week period.[3]

One other issue raised by the plaintiff with regard to the back wages claim is that the defendants rehired the plaintiff at a salary lower than the current salary for his position. Plaintiff contends that unless this oversight is corrected, the plaintiff will continue to suffer loss of wages.

Though this issue has yet to ripen, we strongly urge the defendants to fully comply with our May 17, 1979 Order, and place the plaintiff in the same situation as if the termination had not taken place. This, of course, requires paying the plaintiff at the current salary for his position.

In addressing plaintiff's counsel's request for additional attorney's fees, there is no question that plaintiff's counsel is entitled to additional fees. Since in our November 26, 1979 opinion we approved a rate of $75.00 per hour, and the rate presently requested is the same, the only question before us is whether the number of hours listed are compensable.[4]

Plaintiff's counsel's exhibits set forth in detail the date and number of hours spent on each item of work. The

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[3]We note that there is no mention of plaintiff mitigating his damages during the period in question and the defendants do not request a reduction based upon mitigation. We therefore are awarding the full amount requested.

total number of hours listed is 31 3/4. Careful review of each item persuades us that the total hours listed was necessarily spent, and no item was overstated. It is apparent that plaintiff's counsel has been meticulous in keeping his time records, and has been careful to break down listings to eighths of an hour. We are satisfied that plaintiff's counsel is entitled to an award of additional attorney's fees in the amount of $2,381.25, which total represents the product of 31 3/4 hours multiplied by an hourly rate of $75.00.

ORDER

The defendants' motion to amend and modify the judgment, seeking the dismissal of this case, is DENIED.

The plaintiff's motion to amend and supplement the judgment is GRANTED.

Plaintiff is awarded additional back pay from the defendants in the amount of $5,827.50.

Plaintiff's counsel is awarded additional attorney's fees from the defendants in the amount of $2,381.25.

IT IS SO ORDERED.

S/_____

Charles R. Weiner

Appendix F

APPENDIX F

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 8, 1981 IN *WEAVER VS. BOWERS, ET AL* 657 F2d 1356

No. 80-1245

JOHN H. WEAVER,

v.

G. ROGER BOWERS, GEORGE M. METZGER, and JOSEPH F. CATANIA, Individually and as members of the Board of Commissioners of Bucks County,
Appellants

Submitted Under Third Circuit Rule 12(6)
September 19, 1980

Before: GIBBONS, WEIS AND SLOVITER, *Circuit Judges*

Argued in Banc May 11, 1981

Before: SEITZ, Chief Judge,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Opinion filed September 8, 1981)

Appendix F

Ronald J. Smolow (Argued)
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SLOVITER, *Circuit Judge.*

I.

The underlying fact situation in this case is similar to that which we considered in *Marino v. Bowers.* No. 80-1395 (3d Cir. 1981), decided today. An employee of a Pennsylvania county who was hired when his political party was in power was discharged when that party lost power. Thereafter, in *Elrod v. Burns,* 427 U.S. 347 (1976), the Supreme Court decided patronage dismissals were unconstitutional, and the employee brought suit. Under ordinary circumstances, our holding in the *Marino* case that *Elrod* should not be applied retroactively would be determinative of this case as well. Because this case followed a

significantly different procedural course than did *Marino*, it requires separate consideration.

II.

Plaintiff-appellee, John Weaver, was hired in March 1972 as a park superintendent by the Bucks County Board of Commissioners,[1] then controlled by a Democratic majority. At all times relevant to this litigation Weaver was a registered member of the Democratic Party and was active in party politics. In January 1976 Weaver was discharged by the newly elected Republican-controlled board. On November 15, 1977, Weaver filed his complaint against the commissioners, individually and in their official capacities, alleging that his discharge was "solely by reason of his political party affiliation" and violated his civil rights, specifically his First Amendment right to free speech and his Fourteenth Amendment right to due process. The suit was brought under 42 U.S.C. §§1983, 1985, 1986, 1988.

Unlike their response in the later-filed *Marino* case, defendants did not file a motion to dismiss raising the non-retroactivity of the *Elrod* doctrine. Instead, defendants filed an answer to the complaint denying that Weaver was dismissed because of his political party affiliation and alleging instead that he was dismissed because of his lack of ability and poor work performance. Defendants also denied that Weaver's position of park superintendent was non-policy-making, thereby seeking to avoid application of the holding in *Elrod v. Burns*.[2]

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[1] For the period 1974-76, Weaver's immediate supervisor was Marino, plaintiff in Marino v. Bowers.

[2] Although some language in Elrod v. Burns could have been construed as limiting its holding to non-policymaking officials, the Supreme Court subsequently ruled in Branti v. Finkel, 445 U.S. 507, 518 (1980), that the "ultimate inquiry" is "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."

In this posture the case proceeded to a bench trial before the district court for three days from April 23, 1979 to April 25, 1979. Following the trial, the court issued an opinion on May 17, 1979. After reviewing the evidence, the court found that "all of the evidence in this case points to the inescapable conclusion that plaintiff's employment was terminated because of his political affiliation only." The court found "no-evidence ... of poor job performance or subordination [sic] on the part of [Weaver]", and rejected defendants' argument that Weaver was a policymaking employee. The court stated that Weaver was "nothing more than a glorified foreman, notwithstanding his job title of park superintendent." The court, relying on the Supreme Court's holding in *Elrod,* found the defendants liable. In an order entered the same day. May 17, 1979, the district court directed the defendants to hire Weaver immediately "at the same or similar position and salary which he had at the time of termination, with all of the rights and privileges of seniority which he would have had if the termination had not taken place." The court declined to enter a judgement for lost wages because Weaver had introduced no evidence to substantiate his claim for lost wages.

There followed a series of post-trial motions and maneuvers which need not be reviewed in detail. Weaver sought modification of the judgment to include the award of backpay which the district court had originally declined to enter, and also moved for attorney's fees (motions filed May 29, 1979). Before the district court had taken any action on these motions, defendants appealed to this court (June 6, 1979). At a conference with the district court, the district judge apparently indicated he would retain jurisdiction notwithstanding the appeal, and directed the parties to place all outstanding issues before the court.

Defendants filed post-trial exceptions to the factual findings of the court (August 13, 1979). This court entered an order remanding the case to the district court to rule on the outstanding post-trial motions (October 12, 1979). Defendants then refiled their post-trial exceptions directed to the district court's factual findings (October 19, 1979). Weaver filed a motion to hold defendants in contempt because they had not yet rehired him (October 31, 1979).

On November 1, 1979, the district court filed an order denying "all motions which have been filed by the defendants since the date of trial" and scheduling a hearing on Weaver's contempt motion. On November 27, 1979, the district court ruled on Weaver's motion to amend the judgment to include a backpay award. The court stated that backpay had not originally been granted because additional information had to be submitted, that Weaver had thereafter submitted the necessary information, and that he was therefore entitled to a backpay award. The court entered judgment in the amount of $40,280.59 for backpay. In a separate opinion the same day, the court calculated that Weaver's counsel should be awarded attorney's fees in the amount of $13,200.00 and $1,213.87 for reimbursement of expenses and ordered payment.

On December 6, 1979, defendants filed post-trial exceptions in the form of a motion to amend and modify the judgment in which they contended for the first time 1) that the decision in *Elrod v. Burns* should be given prospective effect only, and (2) that the decisions of the district court "violate the doctrine of governmental immunity afforded to the defendant by the Constitution of the United States." Weaver sought to amend the judgment to include backpay and counsel fees for the supplemental period from July 23, 1979 to November 26, 1979 when he was

rehired. By opinion and order filed January 17, 1980, the district court granted Weaver's request and supplemented the judgment by awarding additional backpay and counsel fees. The court denied defendants' motion, holding that defendants had waived their claims regarding the nonretroactivity of *Elrod* and immunity by raising them well after the trial. The court also indicated that the post-trial motion itself was not timely filed.

Defendants appealed, essentially presenting four issues for review: Whether the district court erred (1) in finding that plaintiff was illegally discharged under the standards set forth in *Elrod;* (2) in applying *Elrod* retroactively; (3) in refusing to find that defendants were immune; and (4) in dismissing defendants' immunity and nonretroactivity defenses because not timely raised.

III.

We first address defendants' contention that the district court erred in finding that Weaver's discharge fell within the proscription of *Elrod v. Burns.* We have examined the record and cannot call clearly erroneous the court's finding that Weaver was dismissed because of his political affiliation. Similarly, even were the relevant inquiry whether Weaver was or was not a policymaking employee, *see* note 2 *supra,* the district court's finding that he was not is also supported by ample evidence, and is not clearly erroneous. Thus, had defendants timely raised their claim that *Elrod* should not be applied retroactively to cover Weaver's dismissal, the same considerations which impelled us to decide against retroactivity in *Marino v. Bowers,* No. 80-1-1395 (3d Cir. , 1981), would be dispositive. Weaver claims, however, that we are precluded from accepting that defense because defendants' contention was not timely raised.

Defendants' claim that *Elrod* should not be applied retroactively attacks the legal sufficiency of the complaint. It is, as such, a defense that the complaint fails to state a claim upon which relief can be granted and should have been made no later than "at the trial on the merits". Fed. R. Civ. P. 12(h)(2). Under the scheme envisaged by Rule 12(h), challenges to the maintenance of an action are divided into three categories. The least favored category, which encompasses the defenses such as lack of jurisdiction over the person, improper venue, and improper or insufficient service of process, must be raised either before or in a responsive pleading. Fed. R. Civ. P. 12(h)(1). This permits the opposing party to address the defect at the initial stage of the litigation, when it can often be corrected in a timely fashion. In direct contrast, the third category, lack of subject matter jurisdiction, may be raised at any time, Fed. R. Civ. P. 12(h)(3), including on appeal. *Trent Realty Associates v. First Federal Savings & Loan Association of Philadelphia,* No. 80-2612 (3d Cir. August 17, 1981). Because this defect deprives the court of its power to adjudicate the controversy, it cannot be waived.

The intermediate category covering the defense at issue here is governed by Rule 12(h)(2) which provides:

> A defense of failure to state a claim upon which relief can be granted a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Although Rule 12(h)(2), in contrast to Rule 12(h)(1), does not expressly provide that the covered defenses will be waived if they are not presented by the time provided,

the clear purport of the rule mandates that construction, and it has been so construed. *See, e.g., Brule v. Southworth,* 611 F.2d 406. 409(1st Cir. 1979); *Simpson v. Providence Washington Insurance Group,* 608 F.2d 1171, 1174 (9th Cir. 1979); *Snead v. Department of Social Services of New York,* 409 F. Supp. 995. 1000 (S.D.N.Y. 1975) (three-judge court). *See also* 5 Wright & Miller, *Federal Practice and Procedure* §1392, at 862. A contrary interpretation would effectively negate the clear design of Rule 12(h) to provide a well-defined course which litigants must follow to preserve their defenses.

We do not consider that a claim raised in a post-trial motion, even were that motion itself timely, is made "at the trial on the merits". While authority is sparse as to what constitutes presenting a defense "at" the trial, it would appear that the defense must be presented so that the court may consider whether there has been a failure to state a claim before disposition on the merits. It is desirable to raise the Rule 12(h)(2) defenses as early as possible, preferably before trial commences if the ruling could avoid any unnecessary trial time. The Rule does not mandate that course, since it permits presentation of any of these defenses "at" the trial. However, if they are raised before the conclusion of the trial, the decision-maker, whether judge or jury, may be spared the time and effort of reaching a conclusion. As the court stated in *Snead v. Department of Social Services of New York,* 409 F. Supp. 995, 1000 (S.D.N.Y. 1975) (three-judge court):

> The clear thrust of the Rule is that a failure to state a claim may be raised at any time *before* a disposition on the merits but not *after.* Any other construction would not only add to intolerable delay, but create uncertainty as to the validity of a final judgment on the merits. (emphasis in original).

In *Black, Sivalls & Bryson, Inc. v. Shondell,* 174 F. 2d 587, 590-91 (8th Cir. 1949), the court stated that a defense of failure to state a claim made in defendant's motion for judgment notwithstanding the verdict was waived because it was made "after the trial and not on the trial." Similarly, in *Jordan v. Weaver,* 472 F.2d 985, 995 (7th Cir. 1973), rev'd on other grounds, *Edelman v. Jordan,* 415 U.S. 651 (1974), the court considered precisely the issue before us, *i.e.,* the retroactivity of a Supreme Court constutional ruling, and stated that because this ground was not presented to the district judge before the entry of judgment, it came too late. It must be noted, however, that the court then proceeded to consider and reject the merits of the defendant's assertion that the ruling should be accorded only prospective effect. *Id.* at 995-96.

Therefore, we agree with Weaver that defendants' claim that *Elrod v. Burns* should be applied only prospectively was presented untimely because it was not raised until substantially after the conclusion of the trial. We must next determine whether this untimeliness is so fundamental a defect so as to deprive us of the power to consider defendants' claim. We have found little analysis on this issue elsewhere. We note, however, that there have been cases in which the defense of failure to join an indispensable party has been considered despite the failure of the movant to raise it "at the trial". *See Martinez Moll v. Levitt & Sons of Puerto Rico Inc.,* 583 F.2d 565 (1st Cir. 1978); *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mutual Casualty Co.,* 365 F.2d 802 (3d Cir. 1966), rev'd on other grounds sub nom. *Provident Trademens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968); *McShan v. Sherrill,* 283 F. 2d 462 (9th Cir. 1960). While these cases may have analogized the absence of an indispensable party to a lack of subject matter jurisdic-

tion, *see* 5 Wright & Miller, *Federal Practice and Procedure* §1392, at 862, an issue we need not resolve here, Rule 12(h)(2) places the defenses of absence of an indispensable party and failure to state a claim in the same category in establishing when they must be presented.[3]

We find some assistance in considering this issue in a recent Supreme Court case which reaffirms the inherent power of the court to consider certain legal issues as required by the interests of justice despite the failure of the parties to preserve them in a timely fashion. In *City of Newport v. Fact Concepts, Inc.*, 101 S. Ct. 2748 (1981), defendant city failed to follow the procedure required under Rule 51 of the Federal Rules of Civil Procedure to challenge the jury instructions regarding assessment of punitive damages. Nonetheless, the Supreme Court reached the merits of the issue, and stated: "Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if we refused now to reach the merits ourselves." *Id.* at 2754 (footnote omitted). The Court declined to limit the exception to Rule 51 to instances of "plain error", and also noted the novelty and importance of the punitive damages issue involved in that case. The Court concluded: "In light of all these factors, we conclude that restricting our review to the plain error standard would serve neither to promote the interests of justice nor to advance efficient judicial administration." *Id.* at 2754 (footnote omitted).

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[3]A possible basis for distinguishing between the two defenses in this regard is that the analysis which must be undertaken under Rule 19 includes consideration of the time and expense of a completed trial, if any. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968).

We believe that in unusual circumstances the courts of appeals also have inherent power to reach issues although not timely raised below. We have previously done so when the occasion warranted. *See, e.g., Spicer v. Hilton,* 618 F.2d 232, 239-41 (3d Cir. 1980); *Allen v. Aytch,* 535 F.2d 817, 819-21 (3d Cir. 1976); *United States ex rel. Gittlemacker v. County of Philadelphia,* 413 F.2d 84, 86-87 (3d Cir. 1969), *cert. denied,* 396 U.S. 1046 (1970).

Thus we proceed to consider whether this is an appropriate case in which to exercise our power in this regard. At the outset, it must be noted that the reasons given by defendants for their failure to raise the nonretroactivity issue are unpersuasive. Before the trial in this case commenced, other courts had already dealt with the question of the retroactivity of *Elrod,* and had decided that issue in favor of defendants' position. *See Ramey v. Harber,* 589 F.2d 753 (4th Cir. 1978), *cert. denied,* 442 U.S. 910 (1979); *Litwhiler v. Hidlay,* 429 F. Supp. 984 (M.D. Pa. 1977). In fact, another judge in the district in which this case was pending had considered and filed a reported decision on this very issue. *See Retail Clerks International v. Leonard,* 450 F. Supp. 663 (E.D. Pa. 1978). Although that court found in favor of retroactivity, it should nonetheless have put defendants on notice of the possibility of raising that defense.[4]

Viewing the equities from Weaver's perspective, defendants' failure to raise the claim in a timely fashion obliged Weaver to expend the effort and expense of a trial and numerous post-trial motions which might have been

[4]We cannot resist observing that throughout the post-trial proceedings defendants consistently sought to strictly apply various time requirements against Weaver.

avoided had the claim of nonretroactivity been presented to the district court and been decided favorably to defendants. On the other hand, we cannot ignore the somewhat ironic fact that because defendants failed to raise this claim, Weaver was enabled to succeed on the merits and as a result has been reemployed by defendants since November 1979, a job he otherwise would not have had.

In this case, therefore, it is not the individual interests of the litigants which impel us to exercise our power reach the merits of the issue of the retroactivity of *Elrod* in this case. We are constrained to do so to vindicate one of the most fundamental jurisprudential concerns evenhandedness in the administration of justice. The ultimate foundation of our system of law and order is the public's peaceful acceptance of and acquiescence in judicial decisions. A bulwark of this public support is the public's confidence that the courts strive to effect justice or at least substantial justice. Through a coincidence of timing, Weaver's case, filed two years before Marino's, appeared on the docket of this court at approximately the same time as Marino's, and was therefore scheduled for argument at the same time. Both men had been in similar situations, having been hired by the same municipal entity at approximately the same time by the same Democratic administration and fired at approximately the same time when the Republican administration took over. We believe that the importance of evenhandedness in application of significant legal rulings overrides the necessity of following the rules of pleading in this unusual instance. We do not decide what the result would have been had Weaver's case reached us before our decision in *Marino* or at some other time under some other circumstances.

We take this occasion to reiterate that all litigants

must strictly observe the time requirements imposed by the Federal Rules of Civil Procedure; we limit our decision to the unusual situation at hand. Accordingly, we will reach the merits of the nonretroactivity defense and apply today's ruling in *Marino v. Bowers* in this case as well. We will reverse the judgment of the district court which applied the *Elrod* decision retroactively, and direct that judgement be entered for defendants.[5]

Because we view defendants' failure to raise the nonretroactivity issue in a timely fashion to have been without legal justification, we consider this to be an apprpriate occasion to direct that defendants, notwithstanding their status as the ultimate prevailing parties, pay Weaver's costs on this appeal. *See* Fed. R. App. Proc. 39(a)(costs of appeal are taxed against nonprevailing party unless court directs otherwise). Other courts have exercised their power to do so in similar situations. *Dailey v. Payne,* 22 Fed. R. Serv. 2d 199, 201 (4th Cir. 1976); *Thompson v. Sun Oil Co.,* 523 F.2d 647, 650 & n.4 (8th Cir. 1975); *McEnteggart v. Cataldo,* 451 F.2d 1109, 1112 (1st Cir. 1971), *cert. denied,* 408 U.S. 943 (1972); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 303 F.2d 609, 612 (7th Cir.), *vacated on other grounds,* 371 U.S. 215 (1962). In addition, because defendants' lack of diligence may have been responsible for unnecessary proceedings below, we will direct that they be required to recompense Weaver for all court costs, exclusive of counsel fee, incurred in the district court post-trial proceedings.

Accordingly, this case will be remanded for such further proceedings in accordance with this opinion.

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[5] In light of our disposition of this case on the retroactivity issue, we need not reach defendants' contentions with regard to their immunity.

Appendix F

WEIS, *Circuit Judge,* with whom Judge Gibbons, joins, dissenting.

For the reasons stated in my dissenting opinion in *Marino v. Bowers,* No. 80-1395, decided this day, I would hold that *Elrod v. Burns,* 427 U.S. 347 (1976), should be applied retroactively and, hence, would affirm the judgment of the district court. The "evenhandedness in the administration of justice" which the court applies in vacating Weaver's judgment because recovery was also denied to Marino, demonstrates once again the difficulty with the concept of nonretroactivity. Weaver may well wonder why "evenhandedness" requires that he be treated the same as Marino, but unlike the successful plaintiffs in *Elrod v. Burns,* and indeed, unlike scores of other public employees who were discharged under similar circumstances just a few months later.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX G

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JANUARY 31, 1980 IN *MARINO VS. BOWERS, ET AL* 483 F. SUPP. 765 (E.D. PA. 1980)

No. 79-2419

NICHOLAS D. MARINO

v.

G. ROGER BOWERS, GEORGE M. METZGER, JOSEPH F. CATANIA and JOHN WELSH
Individually and as members
of the Board of Commissioners of Bucks County,
Appellants

OPINION

LUONGO, J., January 31, 1980

Plaintiff in this civil rights action was fired from his position as maintenance manager of parks and recreation for Bucks County, Pennsylvania, on February 10, 1976, by defendants, all present or former members of the Bucks County Board of Commissioners. Marino alleges that he was fired solely because he is a member of the Democratic party, and does not support the Republican party, to which all of the defendants belong. On June 29, 1979, Marino filed this suit, contending that his dismissal violated his First Amendment rights to free speech and political association;

denied him due process of law; and violated 42 U.S.C. §§1983, 1985, 1986, and 1988. Defendants move to dismiss the complaint under Rule 12(b)(6), F.R. Civ.P., for failure to state a claim upon which relief can be granted.

First Amendment Claim

Defendants first argue that Marino has failed to state a claim under the First Amendment, because Marino's dismissal was lawful under federal and Pennsylvania law when it occurred, and the landmark decision of *Elrod v. Burns,* 427 U.S. 347 (1976), which held "patronage" dismissals unconstitutional, should not be given retroactive effect. *Elrod* was not decided until June 26, 1976, more than four months after Marino had been fired. The factors to be considered in determining whether a precedent-setting decision should be applied retroactively are set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971):

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable effects if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.
>
> 404 U.S. at 106-07, (citations omitted).

With respect to the first criterion, I am satisfied that *Elrod* decided an "issue of first impression whose resolution was not clearly foreshadowed." Until *Elrod,* it was plain that dismissal of "at will" employees for patronage purposes was permissable under Pennsylvania law. *AFSCME v. Shapp,* 443 Pa. 527 (1971). *See Scott v. Philadelphia Parking Authority,* 402 Pa. 151 (1960); *Mahoney v. Philadelphia Housing Authority,* 13 Pa. Comm. Ct. 243 (1974). Numerous federal courts had also rejected constitutional challenges to such dismissals. *Nunnery v. Barber,* 503 F.2d 1349 (4th Cir.), *cert. denied,* 420 U.S. 1005 (1974); *Alomar v. Dwyer,* 447 F.2d 482 (2d Cir. 1971), *cert. denied,* 404 U.S. 1020 (1972); *Young v. Coder,* 346 F. Supp. 165 (M.D. Pa. 1972); *Mason v. Delaware County,* 331 F. Supp. 1010 (E.D. Pa. 1971); *Norton v. Blaylock,* 285 F. Supp. 659 (D. Ark. 1968), *affirmed,* 409 F.2d 772 (8th Cir. 1969). The dissenters in *Elrod* emphasized the majority's radical break from precedent as an argument against declaring patronage firings unconstitutional. (Burger, C.J., Dissenting), 427 U.S. at 325; (Powell, J., Dissenting), 427 U.S. at 376-77.

Marino argues that the defendants should have foreseen the holding of *Elrod,* because one circuit court of appeals had already ruled patronage firings unconstitutional before he was fired, *Illinois State Employees Union v. Lewis,* 473 F.2d 561 (7th Cir. 1972), *cert. denied,* 410 U.S. 943 (1973), and because the Supreme Court had granted *certiorari* in *Elrod.* However, "[e]very decision of the Supreme Court is foreshadowed to some extent by the fact that an issue is sufficiently unsettled to be litigated to the point of review before the Court. Obviously, this is not sufficient to deem the decision retroactive, or there would be no retroactivity doctrine." *Raggio v. Matunis,* No. 76-3132 (E.D. Pa. Nov. 5, 1979), (Cahn, J.), slip op. at 3-4.

Regarding the second *Huson* criterion, Marino contends that *Elrod* must be applied retroactively in order to remedy past wrongful firings. However, the second element of the *Huson* test is not whether retroactivity is essential to cure past "injustice," a test which would require retroactive application in most instances. Rather, the test is whether retroactivity is necessary to accomplish the purpose of the *Elrod* decision, and I see no reason why retroactive application is necessary to insure future adherence to the *Elrod* rule. *Ramey v. Harber,* 589 F.2d 753, 758 (4th Cir. 1978); *Litwhiler v. Hilday,* 429 F. Supp. 984, 986 (M.D. Pa. 1977).

With respect to the third criterion set forth in *Huson,* Marino argues that there is no evidence of record that retroactive application of *Elrod* would work substantial hardship on the defendants or on third parties. Notwithstanding that there may be no personal liability on the individual defendants, retroactive application would nevertheless produce inequitable results, particularly as to third parties. Patronage dismissals have long been recognized as lawful, and the defendants, as well as other government officials similarly situated, have relied upon this rule of law in hiring and firing. Retroactive application of *Elrod* would effectively penalize those who relied upon prior law. Moreover, it is clear that reinstatement of Marino would require either that his successor be dismissed, or that Bucks County taxpayers be saddled with more than one maintenance manager of parks and recreation.

Marino alleges in his complaint that patronage hiring is a practice of long-standing in Bucks County, and it is plain from this and other allegations that he was himself a patronage employee. Marino stressed the "injustice" of his firing, but I am inclined to agree with the Pennsylvania

Supreme Court that, as an equitable matter, "[t]hose who, figuratively speaking, live by the political sword must be prepared to die by the political sword." *AFSCME v. Shapp, supra,* 443 Pa. at 526. *See also Raggio v. Matunis, supra,* slip op. at 4.

Finally, I must consider the severe impact of retroactivity upon the workload of the courts. *Ramey, supra,* 589 F.2d at 760. Marino asserts that retroactive application of *Elrod* will not result in a flood of lawsuits because most claimants will be barred by the statute of limitations. However, Marino himself brought suit more than three years after his dismissal, and given the prevalence of patronage, there are countless other potential plaintiffs who could, if *Elrod* were retroactive, bring similar suits.

Only one federal court to date has explicitly held *Elrod* to be retroactive. *Retail Clerks Intern. Assoc. v. Leonard,* 450 F. Supp. 663 (E.D. Pa. 1978). As I noted in *Boyce v. School District of Philadelphia,* 447 F. Supp. 357, 360-61 (E.D. Pa. 1978), I believe that in reaching this conclusion the *Leonard* court misinterpreted *Rosenthal v. Rizzo,* 555 F.2d 390 (3d Cir. 1977). In my view, the circuit court never reached the issue of retroactivity in *Rosenthal,* so that it is not authoritative precedent on this issue. *Accord, Ramey v. Harber, supra; Raggio v. Matunis, supra.*

The other federal courts which have considered the retroactivity issue have all held *Elrod* nonretroactive. *Ramey v. Harber, supra; Raggio v. Matunis, supra; Lithwiler v. Hilday, supra.* Having analyzed *Elrod* in accordance with the Supreme Court's criteria in *Huson,* I agree that it should not be given retroactive effect.

Marino further argues that even if *Elrod* is not retroactive, earlier First Amendment decisions support his

cause of action. Specifically, he relies upon *Boyce v. School District of Philadelphia, supra,* in which I held that a School District employee's allegations that she was fired in retaliation for making statements critical of the city administration stated a cause of action under *Pickering v. Board of Education,* 391 U.S. 563 (1968), and *Perry v. Sindermann,* 408 U.S. 593 (1972).

The instant case is distinguishable from *Boyce.* There, the plaintiff was not dismissed because of party affiliation, as both the plaintiff and those who fired her were Democrats. She was fired in direct retaliation for an exercise of her First Amendment right of free expression. Here, Marino was not singled out for any particular statements he made; he was the victim of a classic patronage firing. At least until *Elrod,* the law recognized a distinction between direct intereference with First Amendment rights, *e.g., Boyce,* and the indirect "penalty" placed on First Amendment rights by patronage, which was tolerated as part of our political system. Thus, I reject Marino's contention that he has stated a First Amendment claim exclusive of *Elrod.*

Section 1985

Marino also contends that the defendants conspired to deprive him of his civil rights in violation of 42 U.S.C. §1985(3). The Supreme Court has interpreted §1985(3) as requiring that there be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971). Defendants argue that the kind of invidious bias necessary to trigger §1985 is not present here.

Appendix G

In *Carchman v. The Korman Corporation,* No. 78-2178, (3d Cir., March 13, 1979), the Court of Appeals considered the scope of §1985. Plaintiffs in *Carchman* were tenants of a luxury apartment complex who alleged under §1985 that the landlord refused to renew their lease in retaliation for their attempts to organize a tenants' advocacy group. The court noted that discrimination based upon race or gender clearly falls within §1985, because such discrimination is based upon "immutable characteristics for which the members of the class have no responsibility," and because blacks and women "have been the victims of historically pervasive discrimination." Slip op. at 4. Since tenant organizers did not share any of these characteristics, the court refused to declare them a protected class under the statute.

I agree with defendants that discrimination against the members of a rival political party in connection with patronage practices is not the kind of invidious discrimination prohibited by §1985. Unlike race or gender, a person's party affiliation is not an immutable characteristic resulting from an accident of birth for which a person bears no responsibility. Moreover, there is no history of continuous discrimination against the members of any particular party: the political parties have been equally affected by, and equally guilty of, patronage firings. Marino's own allegations undercut his contention that there is pervasive, class-based discrimination against members of the Democratic party, inasmuch as he benefited from the patronage system himself. Accordingly, I hold that Marino has failed to state a claim under §1985.

Appendix G

Sections 1986 and 1988

Marino also contends that he has stated claims under 42 U.S.C. §§1986 and 1988. *A Fortiori,* a claim under §1986 cannot exist because Marino has failed to state a claim under §1985. *Brawer v. Horowitz,* 535 F.2d 830, 841 (3d Cir. 1976); *Kedra V. City of Philadelphia,* 454 F. Supp. 652, 662 (E.D. Pa. 1978). Moreover, Marino's §1986 claim is untimely, because he waited for more than one year to file suit. 42 U.S.C. §1986.

With respect to Marino's §1988 claim, defendants are correct that §1988 creates no independent cause of action, but merely authorizes resort to state law and the common law when federal procedures or remedies are inadequate to provide relief. *Moor v. County of Alameda,* 411 U.S. 693 (1973). Thus, §1988 is of no assistance to Marino except to the extent that he otherwise states a claim upon which relief can be granted.

Due Process

Marino also alleges that his firing offends principles of procedural due process under the fourteenth amendment[1], because he was "summarily" fired without notice or a hearing.

In order to invoke the procedural due process protections of the fourteenth amendment, a public employee

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[1]When the defendants first filed their motion to dismiss, they did not address the procedural due process issue. Because I was unable to determine whether Marino intended to raise a procedural due process claim in his amended complaint, I communicated with counsel to ask their understanding. Marino's counsel stated that he had intended to state a procedural due process claim in the amended complaint (as he had done in the original complaint), and the parties then addressed this issue.

must have a legitimate claim of entitlement to his job rising to the level of a liberty or property interest. *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Whether a public employee has such a claim of entitlement is decided "by reference to state law." *Bishop v. Wood,* 426 U.S. 341, 344 (1976); *Rosenthal v. Rizzo,* 555 F.2d 390 (3d Cir. 1977).

Under Pennsylvania law, "an appointed employee takes his job subject to the possibility of summary removal by the employing authority. He is essentially an employee-at-will." *Scott v. Philadelphia Parking Authority,* 402 Pa. 151, 154 (1960). *Accord, Mahoney v. Philadelphia Housing Authority,* 13 Pa. Commw. Ct. 243 (1974), *cert. denied,* 419 U.S. 112 (1975). Therefore, "unless the legislature has expressly provided tenure for a given class of employees," they may be summarily dismissed without a showing that there is cause for their dismissal. *Rosenthal v. Rizzo, supra,* 555 F.2d at 392. In the instant case, the Pennsylvania statute that provides for the hiring of park maintenance personnel like Marino does not provide tenure for such employees. *See* Pub. L. 323, Act of August 9, 1955, 16 Pa. Stat. Ann. §2511. Accordingly, since Marino has failed to establish a legitimate claim of entitlement to his job, he cannot claim that his dismissal violated the fourteenth amendment.

Defendants' motion to dismiss will be granted.

ORDER

This 31st day January, 1980, it is ORDERED that Defendants' Motion to Dismiss plaintiff's complaint is GRANTED.

S/_____

Alfred L. Luongo

APPENDIX H

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 8, 1981 IN *MARINO VS. BOWERS, ET AL* 657 F2d 1363

No. 80-1245

NICHOLAS D. MARINO,
Appellant

v.

G. ROGER BOWERS, GEORGE M. METZGER, and JOHN WELSH, Individually and Officially as members of the Board of Commissioners of Bucks County and JOSEPH F. CATANIA, Individually and THE BOARD OF COMMISSIONERS OF BUCKS COUNTY and COUNTY OF BUCKS, PENNSYLVANIA,
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 79-2419)

Submitted Under Third Circuit Rule 12(6)
September 19, 1980

Before: GIBBONS, WEIS AND SLOVITER, *Circuit Judges*

Argued in Banc May 11, 1981

Appendix H

Before: SEITZ, *Chief Judge*,
ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Filed September 8, 1981)

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SLOVITER, *Circuit Judge.*

I.

The issue on appeal in this case is whether the Supreme Court's decision in *Elrod v. Burns,* 427 U.S. 347 (1976), should be applied retroactively. The district court held that it should not, and dismissed appellant's complaint. We find that the court correctly applied the retroactivity factors enumerated in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), and affirm.

Appendix H

II.

A.

Appellant Nicholas D. Marino was hired by the Board of Commissioners of Bucks County, Pennsylvania (hereafter Board) in February 1973 as the maintenance manager of parks and recreation of Bucks County, a nonconfidential, non-civil service position. At that time, the three-member Board had a Democratic majority. Marino at all times relevant to this litigation was a registered Democrat. As a result of the November 1975 election in Bucks County, the composition of the Board changed to a Republican majority. On January 3, 1976, the new Board took office. On February 10, 1976, Marino was discharged.

Marino's complaint alleges that he had at all times performed his duties in a good and satisfactory manner, and that he was discharged "solely by reason of his political party affiliation and because he neither supported nor was a member of the newly elected majority political party and was unable to obtain the sponsorship of the leaders of that party." Because this case reaches us on a motion to dismiss, we must accept these allegations as true. Marino's complaint asserted claims under the First and Fourteenth Amendments of the United States Constitution, as well as under 42 U.S.C. §§1983, 1985, 1986 and 1988. Named as defendants were the Board of Commissioners of Bucks County, the County, the current commissioners in their official and individual capacities, and a former commissioner in his individual capacity.[1] Marino requested injunctive and declaratory relief, reinstatement with backpay, and punitive damages.

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[1]Commissioner Catania resigned from office in April 1979; John Welsh was appointed as an interim commissioner. Both Catania and Welsh were named as defendants.

Appendix H

B.

On June 28, 1976, four months after Marino's discharge, the Supreme Court held that the patronage dismisal of a nonpolicymaking, nonconfidential governmental employee violated the employee's rights to freedom of belief and association guaranteed by the First Amendment. *Elrod v. Burns,* 427 U.S. 347 (1976). Three years later, Marino filed his complaint which in substance is based on the *Elrod* decision. Defendants moved to dismiss the complaint for failure to state a claim upon which relief may be granted. Fed.R.Civ.P. 12(b)(6). Defendants claimed that the *Elrod* decision should not be given retroactive effect and that none of the various civil rights statutes pleaded could support the action. In ruling on the motion, the district court looked to the factors set forth in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), as guiding a decision on retroactivity, and concluded that *Elrod* should not be given retroactive effect. *Marino v. Bowers,* 483 F. Supp. 765 (E.D.Pa. 1980). Marino's other constitutional and statutory claims were also dismissed. Marino raises on appeal only the holdings that *Elrod* should not be applied retroactively and that he failed to allege a claim cognizable under 42 U.S.C. §1985(3).[2]

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[2]The district court held that Marino's claim under 42 U.S.C. §1986 must fail because it is dependent on §1985 and because it was filed more than one year after the event and was therefore untimely. Marino's §1988 claim was dismissed because that section creates no independent cause of action. The court also held that Marino's procedural due process claim could not be maintained because he failed to establish a legitimate claim of entitlement to his job under Pennsylvania law. None of these claims are before us on this appeal.

Appendix H

III.

It has long been recognized in criminal as well as civil cases that certain judicial rulings or interpretations should operate only prospectively. *See, e.g., Gelpcke v. City of Dubuque,* 68 U.S. (1 Wall.) 175 (1864); *Havemeyer v. Iowa County,* 70 U.S. (3 Wall.) 294 (1866); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940); *Linkletter v. Walker,* 381 U.S. 618 (1965); *Stovall v. Denno,* 388 U.S. 293 (1967); *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). The Supreme Court has held that even when the new ruling involves an interpretation of the Consituation, it will not necessarily be given retroactive effect, thereby weakening the force of the Blackstonian theory that judges do not make but merely "discover" law. *Linkletter v. Walker,* 381 U.S. at 622-29.

The factors to be considered in deciding whether a ruling is to be limited to prospective application were summarized in the *Chevron* case. First we must consider whether the decision overruled "clear past precedent on which litigants may have relied" or whether the issue was one "of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co. v. Huson.* 404 U.S. at 106. Second, we must look to the prior history of the rule in question, its purpose and its effect to ascertain "whether retrospective operation will further or retard its operation." *Id.* at 107. Finally, we must weigh "the inequity imposed by retroactive application." *Id.*

Marino contends that we should not undertake this analysis because a ruling dealing with fundamental personal rights should never be limited to prospective application. However, review of cases holding that constitutional rulings and interpretations should not be applied retroac-

tively demonstrates that the analysis discussed in *Chevron* and the earlier *Linkletter* and *Stovall* decisions has been used in a wide variety of instances. To cite just a few examples, in *Linkletter* the Court held that the holding of *Mapp v. Ohio,* 367 U.S. 643 (1961). that the exclusionary rule of the Fourth Amendment applied to the states through the due process clause of the Fourteenth Amendment, would not be applied retroactively. *Linkletter v. Walker,* 381 U.S. 618 (1965). Similarly, in *Johnson v. New Jersey,* 384 U.S. 719 (1966), the Court declined to give retroactive application to the rulings of *Escobedo v. Illinois,* 378 U.S. 478 (1964), and *Miranda v. Arizona,* 384 U.S. 436 (1966), which restricted the use of statements made by defendants while in police custody. These cases, although dealing with constitutional rules of criminal procedure, nonetheless implicated fundamental personal rights. Retroactive application of decisions has been denied even where the rulings involved such fundamental rights as the provision for a jury trial in serious criminal cases, *DeStefano v. Woods,* 392 U.S. 631 (1968) (per curiam); the right to have criminal jury panels from which women were not systematically excluded, *Daniel v. Louisiana,* 420 U.S. 31 (1975) (per curiam); the right to vote in revenue bond elections, *Cipriano v. City of Houma,* 395 U.S. 701 (1969) (per curiam); and freedom from "excessive entanglement" of church and state by a scheme of public funding of nonpublic sectarian schools, *Lemon v. Kurtzman,* 411 U.S. 192 (1973). This court has limited to prospective application such significant rulings as lack of federal jurisdiction where diversity is "manufactured", *McSparran v. Weist,* 402 F.2d 867 (3d Cir. 1968) (en banc), *cert. denied,* 395 U.S. 903 (1969); lack of adjudicatory power of improperly convened special court-martial tribunals, *Brown v. United States,* 508 F.2d 618

(3d Cir.) *cert. denied,* 422 U.S. 1027 (1975); and the unconstitutionality of ex parte replevin procedures, *Kacher v. Pittsburgh National Bank,* 545 F.2d 842 (3d Cir.), *cert. denied,* 434 U.S. 857 (1977). In each case we considered whether retroactive application was warranted under the analysis suggested in *Chevron* or its predecessors. We turn them to that analysis.

A.

Did Elrod v. Burns *Establish a New Rule of Law?*

In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F.2d 776 (3d Cir. 1967), *aff'd in part, rev'd in part,* 392 U.S. 481 (1968), antitrust plaintiffs who had proven defendant had monopoly power but had not shown that it had actually engaged in predatory practices sought damages for defendant's monopolization for the entire period covered by the statute of limitations. This court held that the plaintiffs could only collect damages from the date of the Supreme Court's opinion in *American Tobacco Co. v. United States,* 328 U.S. 781 (1946), which we read as establishing a new rule that proof of predatory practices was not essential to a successful claim under section 2 of the Sherman Act. 377 F.2d at 787-90. We reasoned that the defendants had relied on clear and established doctrine and that the new rule of *American Tobacco* should only be applied prospectively.

On appeal, the Supreme Court did not pass upon our theory of prospective application because it determined that the rule announced in *American Tobacco* was not a new one. *Hanover Shoe, Inc. v. United Shoe Machinery*

Corp., 392 U.S. 481 (1968). The Court, noting that *American Tobacco* relied on existing authorities, found no "abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." *Id.* at 497. It concluded that it "[could] not say that prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted them to do all acts conducive to the creation or maintenance of a monopoly so long as they avoided direct exclusion of competitors or other predatory acts," *Id.* at 499.

Thus, in determining whether the rule of law in question fits within the first *Chevron* factor, a court must look both to the state of the law at the time of the ruling and the reasonable perceptions of those persons who claim to have relied on it. Marino argues that *Elrod* had a firm foundation in previous decisions of the Supreme Court, particularly *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), and *Perry v. Sindermann,* 408 U.S. 593 (1972), and therefore was "clearly foreshadowed." In *Barnette,* the Court held unconstitutional a Board of Education resolution requiring all teachers and pupils in public schools to salute the flag. In *Perry,* the Court held that a state university professor could not be discharged for exercising his constitutional right to criticize his superiors on matters of public concern. While these cases reaffirmed the broad diapason of the First amendment, we do not believe that either case was a harbinger of the destruction of the patronage system effected by *Elrod.* The fact that *Perry* and other First Amendment cases were subsequently relied upon by the *Elrod* majority does not signify that *Elrod* was clearly foreshadowed.

On the contrary, there was a substantial line of federal cases which had rejected constitutional challenges to the dismissal of "at will" employees for patronage purposes. *Nunnery v. Barber,* 503 F.2d 1349 (4th Cir. 1974), *cert. denied,* 420 U.S. 1005 (1975); *Alomar v. Dwyer,* 447 F.2d 482 (2d Cir. 1971) (per curiam), *cert. denied,* 404 U.S. 1020 (1972). *See also Young v. Coder,* 346 F.Supp. 165 (M.D.Pa. 1972); *Norton v. Blaylock,* 285 F.Supp. 659 (D.Ark. 1968), *aff'd,* 409 F.2d 772 (8th Cir. 1969). In *Nunnery v. Barber, supra,* the court held that dismissal of a state liquor store manager did not violate either the First or Fourteenth Amendment, and distinguished *Perry v. Sindermann* on the ground that it did not involve a patronage employee. That court failed to see the inevitable connection between *Perry* and patronage dismissals which Marino contends should have been apparent to Bucks County officials. In *Alomar v. Dwyer,* the Court of Appeals for the Second Circuit rejected the claim of a government employee that her discharge based on her refusal to change her political allegiance to the incumbent party violated her rights of free speech and assembly. 447 F.2d at 483. The court held that the "plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political ... affiliations." *Id., quoting Bailey v. Richardson,* 182 F.2d 46, 59 (D.C. Cir.), *aff'd per curaim by an equally divided court,* 341 U.S. 918 (1950). In *Young v. Coder,* 346 F.Supp. at 169, the court, although declining to reach the constitutionality of the "spoils system", concluded that the spoils system "has to date been considered a valid exercise of discretionary authority." Similarly, in *Norton v. Blaylock,* the court commented, "Aside from considerations of race, religion or constitutionally protected conduct, none of which ap-

pear to be involved here, a public employee still assumes the risk, as far as the Constitution is concerned, of being discharged for personal or political reasons." 285 F.Supp. at 662.

More importantly, there was a clear holding of the Pennsylvania Supreme Court that affirmed the legality of such patronage firings. In 1971, Pennsylvania transportation workers sought to challenge the dismissals they anticipated under a forthcoming change of administration. *AFSCME v. Shapp,* 443 Pa. 527, 180 A.2d 375 (1971).[3] Plaintiffs contended that they "should be entitled to notice and a hearing before discharge, and that *political affiliation is not a proper or lawful basis or ground for discharge." Id.* at 536, 280 A.2d at 376 (emphasis added). The Pennsylvania Supreme Court held that plaintiffs had not established a constitutional right to retain their jobs, notwithstanding their allegations that they were being fired solely on the grounds of political sponsorship or affiliation. *Id.* at 377-78. *See also Scott v. Philadelphia Parking Authority,* 402 Pa. 151, 166 A.2d 278 (1960); *Mahoney v. Philadelphia Housing Authority,* 13 Pa. Commw. Ct. 243, 320 A.2d 459 (1974), *cert. denied,* 419 U.S. 1122 (1975).

Using hindsight, it is possible to reconstruct a foreshadowing of the *Elrod* holding in the Seventh Circuit's

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[3] A news story concerning the patronage dismissals in Pennsylvania at the time of this change in administration reported that when the Democrats regained control of the governor's seat in 1971, 3,500 Republican employees lost their jobs in a highway department "reorganization". It reported also that in the prior change of administration to the Republicans, 7,800 Democrats of an 8,000-person workforce in the highway department were replaced by Republicans. *Taking the Politics Out of the Paycheck.* Bus. Week, May 22, 1971, at 22.

decisions in *Illinois State Employees Union v. Lewis,* 473 F.2d 561 (7th Cir. 1972), *cert. denied,* 410 U.S. 928, 943 (1973) (holding political discharges were unconstitutional) and *Burns v. Elrod,* 509 F.2d 1133 (7th Cir. 1975) (holding a claim for patronage dismissal was legally cognizable)[4], as well as in the strong dissents to the Fourth Circuit's decision in *Nunnery v. Barber,* 503 F.2d at 1360-62 (Butzner, J., dissenting), and the Pennsylvania Supreme Court's decision in *AFSCME v. Shapp,* 443 Pa. at 537-45, 280 A.2d at 379-83 (Barbieri, J., dissenting). Whatever the effect of the Seventh Circuit opinions on the officials of status within its jurisdiction. It is unreasonable to expect that county and municipal officials in Pennsylvania should have anticipated the ultimate holding which they presaged. The Pennsylvania Supreme Court decision, which local governments in Pennsylvania must undertake to follow, was a 4 to 3 decision that upheld the political patronage system. Local government officials were undoubtedly aware of the significance of the result, *i.e.,* that a challenge to the patronage system had been mounted and had failed. The dissent, albeit prescient, was nonetheless just that — a dissent. As the court in *Raggio v. Matunis,* 489 F.Supp. 16, 18 (E.D. Pa. 1979), "Every decision of the Supreme Court is foreshadowed to some extent by the fact that an issue is sufficiently unsettled to be litigated to the point of review before the Court. Obviously, this is not sufficient to deem the decision retroactive, or there would be no retroactivity doctrine." The existence of a clear, strongly-worded dissent tends to highlight the majority's rejection of that approach. Were we to require individuals

[4] We do not believe that the grant of certiorari in Elrod v. Burns, 423 U.S. 821 (1975), before Marino's dismissal can be considered reasonable notice to Pennsylvania county officials that a major change in the state of the law was forthcoming.

to be guided in their actions by dissenting opinions we would stand the system of *stare decisis* on its head.

It would not be in denigration of the *Elrod* decision to take note that the practice which is proscribed, political patronage, had been part of our national life from the early days of the republic. The well-publicized employee turnovers under the Jefferson and Jackson eras reflected a way of life which attracted past adherents and present advocates. *See Loughney v. Hickey,* 635 F.2d 1063, 1065 (3d Cir. 1980) (Aldisert, J., concurring). The Justices who dissented from the *Elrod* decision vehemently referred to the substantial change which it wrought. *See Elrod,* 427 U.S. at 375 (Burger, C.J., dissenting) ("The Court strains the rational bounds of First Amendment doctrine and runs counter to longstanding practices that are part of the fabric of our democratic system to hold that the Constitution *commands* something it has not been thought to require for 185 years") (emphasis in original); *id.* at 376 (Powell, J., dissenting) ("The Court holds unconstitutional a practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics"). Commentators were also divided on the issue of the constitutionality of political firings at the time of the *Elrod* decision. *See* Note, *A Constitutional Analysis of the Spoils System — The Judiciary Visits Patronage Place,* 57 Iowa L. Rev. 1320 (1972); Comment, *Patronage Dismissals: Constitutional Limits and Political Justifications,* 41 U. Chi. L. Rev. 297 (1974); Note, *The Spoils System: Ripe for Justiciability?,* 34 U. Pitt. L. Rev. 699 (1973); Note: *Political Patronage and Unconstitutional Conditions: A Last Hurrah for the Party Faithful?,* 14 Wm. & Mary L., Rev. 720 (1973). It is not reasonable to expect our local politicians to be gifted with clair-

voyance. Viewing the state of the law objectively and from the reasonable perspective of the defendants, we believe that *Elrod v. Burns* represented a fundamental shift from prior practice and legal doctrine.

B.

Will Retrospective Operation Further or Retard the Ruling in Elrod v. Burns?

In analyzing the second *Chevron* factor, which the district court characterized as "whether retroactivity is necessary to accomplish the purpose of the *Elrod* decision," it concluded that retroactive application was not necessary to insure future adherence to the *Elrod* rule. 483 F.Supp. at 767. We agree with those courts which have considered the retroactivity of *Elrod* and have found this factor difficult to apply. *See, e.g., Aufiero v. Clarke,* 639 F.2d 49, 51 (1st Cir. 1981); *Ramey v. Harber,* 589 F.2d 753, 758 (4th Cir. 1978), *cert. denied,* 442 U.S. 910 (1979); *Litwhiler v. Hidlay,* 429 F. Supp. 984, 986 (M.D.Pa. 1977). There has been no showing either that retroactive application of *Elrod* will further operation of its rule, or that limiting it only to future cases will retard its operation. In its discussion of this factor in civil cases, the Fourth Circuit in *Ramey v. Harber,* 589 F.2d at 758-59, referred to reliance and the need for stability, matters which appear to verge on the other *Chevron* factors. We focus, as did the district court, on the underlying ruling in question and we see no reason why the prospective application of *Elrod* would not be sufficient to vindicate the constitutional principle it enunciated.

C.

Would Retroactive Application of Elrod v. Burns *Be Inequitable?*

Consideration of the final *Chevron* factor, "the inequity imposed by retroactive application", 404 U.S. at 107, points most persuasively towards prospective application only. In its decision, the district court determined that retroactive application would "effectively penalize those who relied upon prior law." 483 F.Supp. at 768. The court noted that reinstatement of appellant would entail either dismissing his successor or overloading the payroll with more than one maintenance manager of parks and recreation.

We agree with the district court that the equities weigh in favor of defendants. It is not only that political patronage, with the attendant political dismissals, was a way of life. Nor is it only that there are thousands of local government units in Pennsylvania[5] which, in these times of increased government responsibilities and inadequte government funds, may be sorely pressed to pay damages to persons fired before the *Elrod* decision. It is, in this case at least, as the district court noted, that Marino himself was a patronage employee. 483 F.Supp. at 768. He was hired in 1973 by a Democratic administration and was discharged when the Republicans attained a majority.

Marino's complaint alleges the discharge was pursuant to "the custom and practice and official policy of defendants County of Bucks and the Board of Commissioners" to discharge non-civil service employees who were affiliated with the recently defeated political party.

[5] *The Pennsylvania Manual 1978-1979* at 554-56 (g. Ackley & P. Arcuri eds. 1979).

Although we need not embrace the sentiment referred to by the district judge that "[t]hose who, figuratively speaking, live by the political sword must be prepared to die by the political sword," *id., quoting AFSCME v. Shapp,* 443 Pa. at 536, 280 A.2d at 378, a significant factor in considering the equities is a claimant's reasonable expectation. Having apparently acquired his employment under the same system he now attacks, Marino could not have expected that he would be retained once the political climate changed. The expectation today, of course, would be otherwise. But by his own complaint allegations, Marino knew his hold on that position would be tenuous after a change in administrations. Therefore, there is little equity to support his argument for retroactive application of *Elrod.*

Marino relies heavily on the statement in *Owen v. City of Independence, Missouri,* 445 U.S. 622, 655 (1980), where the Court said: "[E]ven where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." The issue before the Court in *Owen* was whether the municipality was entitled to the same qualified immunity defense which individual defendants may assert. In holding the municipality was not entitled to good faith immunity, the Court held that the rationales for the doctrine of official immunity, *i.e.,* to avoid monetary injustice to individual officers and inhibit their official actions, were inapplicable to municipal defendants. The distinction made in *Owen* between municipal and individual defendants cannot logically be applied in deciding whether a constitutional ruling should be applied retroac-

tively. Nothing in the *Owen* case indicates that the doctrine of qualified immunity was intended to supplant the *Chevron* analysis. However, if the sentence in *Owen* on which Marino relies were given the interpretation he suggests, it would foreclose consideration of the third *Chevron* factor, because the balance would always be weighted against the municipality. Where, as here, the application of all the *Chevron* factors points to nonretroactivity, we are unwilling to hold to the contrary based on one sentence of a Supreme Court opinion in a different context.

D.

Based on our review of the foregoing factors, we conclude that the Supreme Court's decision in *Elrod* should not be applied retroactively. We note that this result is consistent with the holdings of all of the federal courts to have considered the issue.[6] *See Aufiero v. Clark, supra; Ramey v. Harber, supra; Raggio v. Matunis,* 489 F.Supp.16 (E.D.Pa. 1979); Litwhiler v. Hidlay, *supra*.[7]

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[6] *Although the opinion in Retail Clerks Int'l Ass'n, Local 1357 v. Leonard, 450 F.Supp. 663 (E.D.Pa. 1978). appears to be on the contrary, a close reading indicates that this is not really the case. The district court in Leonard* believed that this court's decision in Rosenthal v. Rizzo, 555 F.2d 390 (3d Cir.), *cert. denied,* 434 U.S. 892 (1977), mandated retroactive application of *Elrod.* The *Rosenthal* opinion, however, did not address the issue of retroactivity. *See* Raggio v. Matunis, 489 F.Supp. 16, 18 (E.D.Pa. 1979); Boyce v. School dist. of Philadelphia, 447 F.Supp. 357, 360-61 (E.D.Pa. 1978).

[7] Our disposition of the retroactivity issue essentially answers Marino's claim that his discharge violated the First Amendment as it was construed in this context prior to *Elrod.* In this regard we agree with the First Circuit that "[o]ur conclusion that these cases did not clearly foreshadow *Elrod* necessarily means that we do not consider them to compel *Elrod's* result ...." *Aufiero v. Clark,* 639 F.2d at 52.

Appendix H

III.

Marino also asserts a claim under 42 U.S.C. §1985(3) (1976),[8] which he contends was wrongfully dismissed by the district court. That court had concluded that "discrimination against the members of a rival political party in connection with patronage practices is not the kind of invidious discrimination prohibited by §1985." 483 F.Supp. at 769. As the Supreme Court said in *Great American Federal Savings & Loan Ass'n v. Novotny,* 442 U.S. 366, 372 (1979), "Section [1985(3)] provides no substantive right itself; it merely provides a remedy for violation of the rights it designates." Since we have determined that Marino cannot rely on retroactive application of *Elrod v. Burns* as the source of his asserted constitutional rights, we need not consider whether the district court correctly construed section 1985(3).

For the foregoing reasons, we will affirm the judgment of the district court.

WEIS, *Circuit Judge,* with whom Judge Gibbons joins, dissenting.

It has long been a tenet of the common law that a court does not pronounce new law, but expounds the law of the case as it existed when the controversy arose.

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[8] If two or more persons ... conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws ... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Although it antedates Blackstone's era, this view is expressed in his commentaries and is generally referred to as the Blackstonian Theory.[1] Its essence is that since law is merely "discovered" in the disposition of a case, it follows logically that the decision, as a declaration of what the law had always been, is given retroactive effect. In this respect a judicial decision contrasts sharply with the action of a legislature whose statutes are prospective in nature. The difference in approach may be explained in part by the fact that the courts are called upon to resolve disputes after they have arisen. In deciding for one party or the other, the decision, of necessity, operates retroactively.

The Blackstonian theory, however, has been modified, to some extent, by the influence of John Austin. He contended that courts indeed make law and do not simply interpret the old, and this argument did not escape the United States Supreme Court. In discussing the effect of a declaration of a statute's unconstitutionality. Chief Justice Hughes remarked in *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371 (1940), that a determination of unconstitutionality "may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration .... [A]n all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Id.* at 374 (footnotes omitted).

By 1965, the Court had come to the view "that in appropriate cases the Court may in the interest of justice make the rule prospective." *Linkletter v. Walker,* 381 U.S. 618, 628 (1965). In *Chevron Oil Co. v. Huson,* 404

[1] *See* 1 W. Blackstone Commentaries, *69; Note, *Prospective Overruling And Retroactive Application In The Federal Courts,* 71 YALE L.J. 907 (1962).

U.S. 97 (1971), the Court listed three conditions that were to be met, particularly in civil cases, if only prospective application was to be appropriate. The opinion nontheless confirms that retroactivity is the rule, not the exception.

There are sound philosophical reasons for generally observing the rule of retroactivity. It is important that courts have the confidence of the public in the disposition of disputes submitted to them. That support is in part based upon the belief that judges are bound by law, which is applied impersonally and impartially. Especially is this so with respect to constitutional adjudications which are not subject to revision by democratic legislative processes. Sir John Salmond expressed the sentiment well, "In the application of and enforcement of a fixed and predetermined rule, alike for all and not made for or regarding his own case alone, a man will willingly acquiesce. But to the 'ipse dixit' of a court, however just or impartial, men are not so constituted as to afford the same ready obedience and respect." Quoted in Cooperrider. *The Rule Of Law And The Judicial Process,* 59 MICH. L. REV. 501, 505 (1961).

In addition, retroactivity has a tendency to act as a restraint on judicial legislating. When a court is required to ponder the effects of a decision departing from previous pronouncements upon those who have justifiably relied upon earlier rulings, its judgment may be better informed and confined to proper judicial boundaries. *See James v. United States,* 366 U.S. 213, 225 (1961) (Black, J., dissenting); Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law,* 79 HARV. L. REV. 56, 70 (1965).

Although these considerations do not bar prospective rulings in appropriate cases, they do counsel against a too facile interpretation of the *Chevron* guidelines.

Appendix H

I.

The application of the first *Chevron* factor — whether *Elrod v. Burns,* 427 U.S. 347 (1976), established a new principal of law — requires an analysis of the law as it existed when the plaintiff was discharged and whether it justified the defendant's action. As the majority recognizes, this element is satisfied either by showing that *Elrod* overruled clear past precedent on which the litigants may have relied, or by establishing that the case decided an issue off first impression whose resolution was not clearly foreshadowed.

These two elements should not be confused. Either is sufficient to meet the test, and in the interest of clarity, they should be separately considered. Furthermore, it must be recognized that the first factor presents a threshold inquiry. The *Chevron* Court said "the decision to be applied nonretroactively must establish a new principle of law." 404 U.S. at 106. And, as the author of the *Chevron* opinion explained only six months later, "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law." *Milton v. Wainwright,* 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting; the majority did not reach this issue); *see Kremer v. Chemical Construction Corp.,* 623 F.2d 786, 789 (2nd Cir. 1980).

A.

The first of the alternate questions, then, is whether *Elrod* overruled clear past precedent on which the litigants may have relied. Since there was no controlling decision of the United States Supreme Court or this court, the majority relies primarily on *AFSCME v. Shapp,* 443 Pa. 527, 280

A.2d 375 (1971), and to a lesser extent on *Nunnery v. Barber,* 503 F.2d 1349 (4th Cir. 1974), *cert. denied,* 420 U.S. 1005 (1975), and *Alomar v. Dwyer,* 447 F.2d 482 (2d Cir. 1971) (per curiam), *cert. denied,* 404 U.S. 1020 (1972), as well as several district court cases.

It may be tempting to assume that because the Supreme Court did not overrule any of its cases in resolving *Elrod,* this aspect of the first *Chevron* criterion has not been met. However, in *United States v. Peltier,* 422 U.S. 531 (1975), the Court expressly held "that parties may ... reasonably rely upon ... legal pronouncement[s] emanating from sources other than this Court." *Id.* at 542. There, the issue was whether the Court's decision in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), invalidating border searches conducted without probable cause, should be applied in nonretroactive fashion. The Court held that it could because "uniform treatment of roving border patrol searches by the federal judiciary was overturned by this Court's decision in *Almeida-Sanchez.*" 422 U.S. at 542. Likewise, in *Chevron* the Court found the test satisfied because the law-changing decision at issue there, *Rodrigue v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969), "effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act." 404 U.S. at 107.[2]

In this circuit there was no binding precedent on this issue of federal constitutuional law. The majority asserts that *AFSCME v. Shapp,* a decision of the Pennsylvania Supreme Court, is particulary significant because local

[2] The *Chevron* Court also concluded that *Rodrigue* decided an issue of first impression whose resolution was not clearly foreshadowed. *See* 404 U.S. at 107.

governments in the state were required to follow it. It must be remembered, however, that it is a federal constitutional right at issue here, and in that field no federal court is bound by a decision of a state supreme court, despite our deference to its rulings in matters of state law. Municipalities in Pennsylvania had to be aware of that basic premise, as well as the fact that this court had not decided to the constitutional issue. The *AFSCME* case, therefore, did not entitle the defendants to assume that the issue had been foreclosed in federal forums.

Moreover, the *AFSCME* majority did not present a persuasive case. Indeed, the opinion of the court represented the views of only two judges, two others simply concurring without opinion. The *AFSCME* court's opinion cited only one federal case, *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886 (1961), and relied on it for the proposition that government employment could be revoked at the will of the appointing officer. In that case, however, the plaintiff was not employed by the government, but by a private contractor.

On the other hand, the dissent written by Justice Barbieri, in which two other justices joined, effectively distinguished the federal precedent cited in the court's opinion and convincingly demonstrated that governmental employees could not be discharged solely because of their political views. If anything, the weakness of the majority position and the strength of the dissent were a warning much like a breeze rustling the leaves before a storm. In the following year, moreover, *Perry v. Sinderman,* 408 U.S. 593 (1972), dissipated what little strength the *AFSCME* opinion retained after the dissent's strong attack. In *Perry,* the United States Supreme Court made it quite plain that although a person had no right to govern-

ment employment, it could not be denied because "of his constitutionally protected speech or associations." *Id.* at 597.

In short, by 1972 any reliance upon *AFSCME v. Shapp* as an authoritative exposition of federal constitutional law was indeed misplaced. *Alomar v. Dwyer* also had to be read with caution. That per curiam opinion by the United States Court of Appeals for the Second Circuit relied to a large extent upon the older case of *Bailey v. Richardson,* 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court,* 341 U.S. 918 (1951). The passage of time, the growing complaints against the patronage system, and more recent decisions of the Supreme Court in the public employment-first amendment context, however, cautioned against undue reliance upon *Bailey v. Richardson.* Similarly, in *Nunnery v. Barber,* Judge Butzner in a strong dissent said that a government employee could not be discharged solely because of the exercise of first amendment rights in associating with a particular political party.

At the time the plaintiff was discharged, therefore, there was some case law contrary to the Supreme Court's forthcoming decision in *Elrod,* but not without vigorous dissent. Moreover, positive support for *Elrod's* eventual holding had been given by the Court of Appeals for the Seventh Circuit in *Illinois State Employees Union v. Lewis,* 473 F.2d 561 (7th Cir. 1972), *cert. denied,* 410 U.S. 943 (1973). There the majority held that non-policymaking government employees could not be discharged merely because of their political affiliations. This holding, too, prompted a dissent, and the majority position provoked lively discussion among legal commentators.[3] Following

[3] *E.G.,* 41 U. CHI. L. REV. 297 (1974); 4 LOY. U.L.J. 459 (1973); 34 U. PITT. L. REV. 699 (1973); 7 SUFF. L. REV. 1098 (1973); 26 VAND. L. REV. 1090 (1973).

its precedent in *Lewis,* the same court of appeals decided *Burns v. Elrod,* 509 F.2d 1133 (7th Cir. 1975), and the Supreme Court granted certiorari in 1975, the year before the plaintiff in this case was discharged.

Federal district judges were in no more agreement than their appellate colleagues. But as early as 1973, it had been determined in the same district in which the present case arose that a governmental employee could not be discharged because he refused to contribute to a political party. *Bond v. County of Delaware,* 368 F.Suppl. 618 (E.D. Pa. 1973).

Thus, a survey of decisional law demonstrates that from at least 1970, first amendment attacks on the patronage system by non-policymaking governmental employees were actively litigated in a number of courts. During that period of time, it is fair to say that there was no "clear past precedent" on which the litigants could justifiably have relied. There was precedent, but it was divided at best. *See Kremer v. Chemical Construction Co.,* 623 F.2d at 789-90.

To have acted on the assumption that patronage discharges were constitutional was hazardous, particularly after 1975 when the Supreme Court granted certiorari to resolve the inconsistencies in the lower courts. At that point there could be no doubt that there was, at the very least, uncertainty. That should have alerted the defendants and prompted them to refrain from discharging an employee for political reasons — at least until the Supreme Court resolved the constitutional issue.

B.

The alternative aspect of the initial *Chevron* factor is

whether *Elrod* decided an issue of first impression whose resolution was not clearly foreshadowed. The question whether patronage dismissals unconstitutionally abridged the first amendment rights of public employees was one of first impression in the Supreme Court. However, the first amendment analysis applied by the Court was not new. The majority relied on *CSC v. Letter Carriers,* 413 U.S. 548 (1973), and *United Public Workers v. Mitchell,* 330 U.S. 75(1974), in holding that the various governmental interests said to be served by patronage were either insufficient to support the practice or could be accommodated by other less intrusive means. The real question in *Elrod* was whether the Court would apply this traditional first amendment balancing test to the practice of patronage. As then Judge Stevens pointed out in *Illinois State Employees Union v. Lewis,* the patronage system had survived historically because it had generally been assumed that a public employee had no right to a government job.

On several occasions the Supreme Court had held that although a person might not have a right to public employment, receipt of that benefit could not be conditioned on the relinquishment of a constitutional right. In *Weiman v. Updegraff,* 344 U.S. 183 (1952), for example, the Court invalidated a requirement that state employees deny past or present association with Communists. A similar loyalty oath for school teachers was struck down on first amendment grounds in *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).

The same rationale led to the holding in *Perry v. Sindermann* that a state college professor could not be discharged because he exercised his first amendment right to publicly criticize the school administration's policies. The Court wrote that the government could not deny a benefit

to a person on a basis that infringed his interest in freedom of speech. Otherwise his "exercise of those freedoms would in effect be penalized or inhibited." 408 U.S. at 597.

The lower federal courts that found discharges based on political affiliation constitutionally defective relied principally on *Perry v. Sindermann*. For example, *Illinois State Employees Union v. Lewis* and *Bond v. County of Delaware* held that the rationale of *Perry* and earlier cases logically led to the conclusion that continued employment predicated on surrender of associational rights violated the constitution.

The Supreme Court adopted this reasoning in *Elrod*. Although a plurality focused on the coercive effect of the patronage system, it was the other basis, that of unconstitutionally conditioning public employment, which commanded a majority. It is this narrow ground that represents the holding of the Court. *Branti v. Finkel*, 445 U.S. 507, 516 (1980); *Marks v. United States*, 430 U.S. 188, 193 (1977). From this perspective, *Elrod* was presaged by *Perry v. Sindermann*, decided four year earlier. While the dissent in *Elrod* characterized the holding as a dramatic break with the past, the majority expressed no similar sentiments, and is the majority opinion that must be studied to determine if a new legal principle has been announced. *See Dasho v. Susquehanna Corp.*, 461 F.2d 11, 20-21 (7th cir.), *cert. denied*, 408 U.S. 925 (1972). In my view, the first *Chevron* criterion has not been established.

The choice between retroactive and nonretroactive application is often a difficult one, and the analysis of the facts of each case with respect to the *Chevron* criteria is

subject to differences of opinion.[4] In any event, the party seeking to avoid the usual application of retroactivity bears the burden of establishing the necessity for the exception, *Cash v. Califano,* 621 F.2d 626. 629 (4th Cir. 1980), and must show that all three factors favor his position. If proof fails as to one, then his burden has not been met. *See Holzager v. Valley Hospital.* 646 F.2d 792, 797 (2d Cir. 1981), *citing Kremer v. Chemical Construction Corp.,* 623 F.2d at 789-90. From my standpoint, the threshold element has not been satisfied, and thus, there would be no need to discuss the other two elements. Since the majority has addressed them, however, I shall briefly set out my views.

II.

A retroactive application of *Elrod* will further the remedial policies announced in that case, and thus, the second *Chevron* criterion points to retroactivity. Unlike those decisions designed primarily to deter future illegal conduct, *Elrod* compensated an individual for an injury already suffered. Although I confess some doubt whether the second element cuts decisively one way or the other, I lean toward the view that to the extent similar claims are outstanding and viable, a retroactive application will further, not retard, the holding of the case.

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[4]Although the Supreme Court has made frequent use of nonretroactive decisions since *Linkletter,* the scholarly debate over the wisdom of that practice is a vigorous one. For a collection of materials on the subject, *see R. Aldisert.* The Judicial Process 877-938 (1976). An extended discussion and review of the principal cases may be found in Beytaugh, *Ten Years Of Nonretroactivity: A Critique And A Proposal,* 61 VA. L. REV. 1557 (1975).

III.

I do not believe that substantial inequities would result if *Elrod* were made retroactive. The plaintiff's constitutional rights were violated and should be vindicated. It may be true that relief in the nature of rehire could impose some burdens on a governmental body. When the harm to the individual is weighed against the expense and inconvenience to a municipality, however, the balance must be struck in favor of the plaintiff. Thus, in *Owen v. City of Independence,* 445 U.S. 622 (1980), the Court said, "[E]ven where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate and resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." *Id.* at 655. The *Owen* majority, in denying an immunity for a municipality, confronted and dismissed the very same arguments of inequity urged here.[5]

The terms retroactive, nonretroactive, and prospective have been defined as presenting the issue whether a case that substantially alters the relevant body of prior law should govern (1) only future cases and neither the parties before the court nor any previous or pending cases ("prospectivity"), *see, e.g.,* Cipriano v. City of Houma, 395 U.S. 701 (1968); (2) future cases as well as the litigants at bar but not previous or pending cases ("nonretroactivity"), *see, e.g.,* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), and Desist v. United States, 394 U.S. 244 (1969); and (3) future cases, the present litigants, and all fact situations arising before the date of the law-changing decision that are still reviewable either by direct appeal or by collateral attack ("retroactivity"), *see, e.g.,* Moore v. Illinois, 408 U.S. 786 (1972).

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[5] Insofar as the defendants in their individual capacities are concerned, the defense of qualified immunity may offer reasonable protection. To defeat immunity, the plaintiff must do more than establish the "foreshadowing" that meets the *Chevron* test. He must show that

Appendix H

The Pennsylvania Supreme Court's quip in *AFSCME*, "those who, figuratively speaking, live by the political sword must be prepared to die by the political sword," 443 Pa. at 536, 280 A.2d at 378, was rejected by the United States Supreme Court in *Elrod* and again in *Branti v. Finkel*, 445 U.S. at 512 n.6. Thus, the majority's argument that it is inequitable to allow a person who obtained his position through patronage to retain his job after his benefactors have lost their office really quarrels with the decision in *Elrod* itself. The fact that the plaintiff obtained his employment through patronage should not obscure the fact that the present incumbent also invoked that process and thus has no superior claim to the position. As between past and present employees, therefore, no compelling equities exist. Moreover, why the *Elrod* plaintiffs are entitled to a remedy, but the plaintiff here is not does not leap from the pages of the majority opinion. That difficult question, of course, is always one of the unanswerable issues in a nonretroactive decision.[6]

Serious reservations on the part of a court of appeals about the wisdom of a Supreme Court holding are not

[5] the right was "clearly established." *See* Procunier v. Navarette, 434 U.S. 555 (1978); Reese v. Nelson, 598 F.2d 822 (3d Cir.), *cert. denied*, 444 U.S. 970 (1979). "Foreshadowing," as that term is used in Chevron Oil Co. v. Huson, does not address the concept of clearly established rights in the immunity context where different considerations apply. For example, the knowledge of the individual defendants is an important factor. *See* Wood v. Strickland, 420 U.S. 308 (1975). A holding that the defendants did not act in derogation of a clearly established constitutional right — and thus enjoy a qualified immunity — would not be inconsistent with a determination that *Elrod* applies retroactively.

[6] Indeed, in the companion case of Weaver v. Bowers, No 80-1245, decided this day, the court reverses a judgment for the plaintiff primarily because it would be inequitable for him to recover when that right is denied Marino.

valid reasons to choose nonretroactivity. It has been said that the surest way to insure the repeal of an unwise statute is to enforce it to the letter. A somewhat similar argument could be made in favor of giving retroactive effect to a ruling with which a judge disagreed. However, I do not believe that either approach should bear on resolution of the retoractivity question.[7]

Thus, I disagree with the holdings of the majority and of the Courts of Appeals for the First and Fourth Circuits that *Elrod* should only be applied nonretroactively *Aufiero v. Clark,* 639 F.2d 49 (1st Cir. 1981); *Ramey v. Harber,* 589 F.2d 753 (4th Cir. 1978), *cert denied,* 442 U.S. 910 (1979). Retroactivity serves important jurisprudential ends which should not be lightly disregarded. The compelling reasons in *Linkletter v. Walker, Chevron Oil Co. v. Huson,* and the other cases which led the Supreme Court to deviate from its historic adherence to the common law rule are not present here and nonretroactivity is not justified. I would reverse the judgment of the district court.

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[7] As an illustration of the difficulty encountered in reaching principled decisions in nonretroactivity cases, Justice Harlan, a model of intellectual integrity, confessed.

> "I have in the past joined in some of those opinions [on nonretroactivity] which have, in so short a time, generated so many incompatible rules and inconsistent principles. I did so because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle. I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. 'Retroactivity' must be rethought."

Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting). *See generally* Wechsler, *Toward Neutral Principles Of Constitutional Law,* 73 HARV. L. REV. 1 (1959).

Appendix H

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX I

ORDER SUR PETITION FOR REHEARING FILED OCTOBER 13, 1981.

No. 80-1245

JOHN H. WEAVER,

Appellee

v.

G. ROGER BOWERS, GEORGE M. METZGER, and JOSEPH F. CATANIA, Individually and as members of the Board of Commissioners of Bucks County,

Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTERS, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judge,*

The petition for rehearing filed by

John H. Weaver, *appellee,*

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Dated: October 13, 1981 S/Delores Sloviter
Circuit Judge

APPENDIX J

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

1. The following provisions of the *Constitution of the United States* are involved:

AMENDMENT I

Congress shall make no law respecting an establishing of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The following statutory provisions are involved.

42 USC §1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USC §1985 CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

(1) PREVENTING OFFICER FROM PERFORMING DUTY. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) OBSTRUCTING JUSTICE; INTIMIDATING PARTY, WITNESS, OR JUROR. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any ver-

dict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

(3) DEPRIVING PERSONS OF RIGHTS OR PRIVILAGES. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property,

or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured, or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 USC §1986 ACTION FOR NEGLECT TO PREVENT CONSPIRACY.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USCS §1985], are about to be committed, and having power to prevent or aid in prevention the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefore, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Appendix J

42 USC §1988 PROCEEDINGS IN VINDICATION OF CIVIL RIGHTS

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§1 et seq.] or title VI of the Civil Rights Act of 1964 [42 USCS §§2000d et seq.], the court, *in its discretion,* may allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs.*

Appendix J

3. The following provisions of the Federal Rules of Civil Procedure are involved:

Rule 6
TIME

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held. As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 1, 1971, eff. July 1, 1971.

(b) *Enlargement.* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefore is made before the expiration of the period originally prescribed or as

extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them. As amended Dec. 4, 1967, eff. July 1, 1968.

Rule 52.

FINDINGS BY THE COURT

...

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 59.

NEW TRIALS; AMENDMENT OF JUDGMENTS

...

(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment. As amended Dec. 27, 1946, eff. Mar. 19, 1948.

...

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. Added Dec. 27, 1946, eff. March 19, 1948.

Appendix J

4. The following provisions of the Federal Rules of Appellate Procedure are involved.

Rule 4.
APPEAL AS OF RIGHT - WHEN TAKEN

(a) *Appeals in Civil Cases.* In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

Appendix J

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by the subdivision commenced to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Opposition

81-1051

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ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN H. WEAVER,
Petitioner

v.

G. ROGER BOWERS, GEORGE M. METZGER, and JOSEPH F. CATANIA, Individually and as members of the Board of Commissioners of Bucks County
Respondent

BRIEF IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Where the Third Circuit Court of Appeals applied the fundamental jurisprudential concept of even after considering the procedural differences and substantive similarities between Petitioner's case and that of another county employee, wasn't the Court of Appeals acting within the accepted course of judicial review in reversing the District Court?

2. Didn't the Third Circuit Court of Appeals have subject matter jurisdiction to hear and decide this case where only the last of four orders was a final order, and the appeal from that order was timely, or in the alternative, where a premature appeal related forward to a later final order, no prejudice was shown to have resulted from the prematurity and a later appeal was timely?

3. Where Petitioner was rehired temporarily pending the outcome of the appeal by an agreement between the parties made without prejudice and all of the circumstances surrounding such agreement, not part of the record, was it error to deny the Petitioner attorney's fees as a prevailing party pursuant to 42 U.S. Code § 1988?

4. Where every Circuit Court of Appeals which has considered the issue has reached the same conclusion and the issue has been fully briefed and argued, didn't the Third Circuit Court of Appeals act properly in failing to allow retroactive applications of *Elrod vs. Burns*, 427 U.S. 347 (1976)?

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No. _____

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G. ROGER BOWERS, GEORGE M. METZGER, and JOSEPH F. CATANIA, Individually and as members of the Board of Commissioners of Bucks County
Respondent

BRIEF IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RULES INVOLVED

1. The following provisions of the Rules of the Supreme Court of the United States are involved:

   Rule 17

The full text of this Rule is set forth in Appendix "A" which is attached hereto.

COUNTERSTATEMENT OF THE CASE

Respondent has no argument with the factual content of Petitioner's Statement of the case but adds the following supplemental statement because of its relevance to the arguments advanced by the parties.

On June 6, 1979 defendants filed an appeal from the judgment of May 17, 1979. On May 29, 1979, Plaintiff filed post trial motions to amend and modify the judgment. On June 14, 1979, while his motions were outstanding, Plaintiff appealed to the Court of Appeals. On October 12, 1979, the Court of Appeals remanded both appeals to the District Court to deal with numerous matters referred to in the motions.

On August 7, 1979, defendants filed a motion requesting, inter alia, a stay of the order of May 17, 1979, directing reinstatement. On October 31, 1979, Plaintiff filed a Motion for Compliance, Sanctions and Contempt. On November 1, 1979, the District Court denied all motions filed by Defendants, granted a rule to show cause why Defendants should not be held in contempt for failure to rehire plaintiff and set a hearing date for contempt. On November 8, 1979, the District Court denied defendants' Motion for a stay. On November 27, 1979, the District Court granted Plaintiff's motions for back pay and attorneys' fees.

The Court of Appeals cited both authority and precedent for its decision to reverse the District Court. Moreover, Petitioner's representation of the words of the Court of Appeals is misleading; the Court of Appeals actually stated that it was not deciding what the result would have been had Weaver's case reached it at some other time under other circumstances.

Reasons for Denying Certiorari

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE GROUNDS FOR THE REQUEST ARE NOT OF THE CHARACTER SET FORTH IN UNITED STATES SUPREME COURT RULE 17.

I.

Although Petitioner has couched his reasons in the language of United States Supreme Court Rule 17, none of his rationales for requesting certiorari actually fit within the parameters of the Rule, as will be shown below.

A. THE CIRCUITS ARE NOT IN CONFLICT

Since the holding of this Court in *Elrod v. Burns*, 427 U.S. 347 (1976), three Circuit Courts have considered the issue of retroactive application of *Elrod*. *Aufiero v. Clarke*, 639 F.2d 49 (1st Cir. 1981), cert. denied, 101 S.Ct. 3052 (1981); *Ramey v. Harber*, 589 F.2d 753 (4th Cir. 1978), cert. denied, 99 S.Ct. 2823 (1979); *Marino v. Bowers*, et al, 657 F.2d 1363 (3d Cir. 1981). The courts have been in accord in holding *Elrod* to be non-retroactive and this Court has twice refused certiorari.

B. THE THIRD CIRCUIT COURT OF APPEALS HAD SUBJECT MATTER JURISDICTION

Petitioner's claim is that the Third Circuit Court of Appeals did not have subject matter jurisdiction of the appeal taken by the defendant commissioners because the appeal was not timely. To bolster its argument, petitioner cites this Court's decision in *Browder v. Director, Department of Correction of Illinois*, 434 U.S. 66 (1978) in which it was held that a notice of appeal must be filed within thirty days of entry of judgment or order from which the appeal is taken unless the running of time has been tolled by a timely motion filed in the District Court. The thirty day time limit is mandatory and jurisdictional; however, the judgment or order must be final.

Respondent has no argument with the law as presented in *Browder*; merely, it is obvious that *Browder* has no application to this case under either one of two arguments: first, that the only final order was that of January 17, 1980, that all previous orders merged into the January 17, 1980 order and that defendants' January 30, 1980 appeal was thus timely as to all orders; or second, that the first appeal by defendant on June 6, 1979 which was timely as to the order of May 17, 1979, but premature because the May 17, 1979 order was not final relates forward to the final order if the final order is deemed to be that of November 27, 1979 and the second appeal relates only to the order of January 17, 1980, there being no question that the second appeal was timely.

There were four judgments in this case:

May 17, 1979 — judgment for plaintiff for reinstatement
November 27, 1979 — award of back pay to plaintiff
November 27, 1979 — award of attorney fees to plaintiff
January 17, 1980 — award of further back pay and attorneys' fees to plaintiff

The first question which must be faced is which order of the District Court is the final order. A final order is one which "terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." *St. Louis Iron Mountain and Southern Ry. Co. v. Southern Express Company*, 108 U.S. 24, 28-29 (1883). *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977).

In *Richerson*, an employment discrimination case, the District Court for the Eastern District of Pennsylvania entered an order granting judgment for plaintiff, then entered an order awarding, inter alia, back pay and a subsequent order awarding counsel fees and expenses to plaintiff; the Third Circuit held that the last order was a final order because it disposed of the last of plaintiff's prayers for relief.

In *Richerson*, the defendant appealed the initial order of judgment as well as the two subsequent orders but later withdrew its appeal for the last order. The Third Circuit held that only the last order was final but that the premature notice of appeal should be regarded as an appeal from the final order in the absence of showing of prejudice to the other party by the prematurity of the appeal.

Weaver filed his last motion on December 11, 1979 and labeled it a Motion to Amend and Supplement the Judgment of November 27, 1979. The motion requested a further award of back pay and attorney's fees. The District Court considered the motion as raising the issue of whether the "prior orders provided adequate and complete relief" and, finding they did not, awarded additional back pay and attorney's fees. Appendix E, page 19a. Thus, the final judgment was that of January 17, 1980 and there is no question of the timeliness of the appeal from this order.

The better rule is that, in the absence of prejudice to the appellee, the court should treat a premature appeal as from a final judgment so as to avoid denial of justice, expense and inconvenience. *Yaretsky v. Foley*, 592 F.2d 65 (2d Cir. 1979). Thus, even if the orders of November 27, 1979 and that of January 17, 1980 are each considered final orders, respondent's initial appeal on June 6, 1979, will relate forward to be deemed an appeal from the orders of November 27, 1979.

An appeal should not be dismissed because technically premature if an appealable judgment or order is rendered below, the appellant clearly manifested his intent to appeal from it, and the prevailing party below can show no prejudice resulting from prematurity of the notice. *9 Moore's Federal Practice* §204.14 at 983 (2d edition. 1975); *Jackson v. Tennessee Valley Authority*, 595 F.2d 1121 (6th Cir. 1979). Moreover, mere technicalities will not be used to avoid decisions on the merits. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41 (1957).

Petitioner has not claimed to have been prejudiced by the filing of a premature appeal.[1] Further, he also cannot seriously claim that he was misled by the notice of appeal of January 30, 1980 being designated only as an appeal from the final order of January 17, 1980 as he briefed and argued all issues raised in all four orders for the Court of Appeals.

---

[1] On June 14, Petitioner filed a Cross-Appeal from the order of May 29, 1979. Respondent argued unsuccessfully to the District Court that filing this Cross-Appeal acted as a waiver of the issues raised in the motions filed by Weaver which were then outstanding in the District Court.

The requirement that the notice of appeal designate the judgment or part thereof appealed from was designed to simplify the taking of an appeal by requiring nothing more for its perfection than an identification of the judgment by the date of its entry. *State Farm Mutual Automobile Insurance Company v. Palmer*, 350 U.S. 944 (1956). In *State Farm*, the defendant's motion for a new trial and to amend findings were denied and defendant filed a notice of appeal from order denying the motion, identifying it by date. The Court of Appeals dismissed the appeal on the basis that, since the defendant in fact desired review of the judgment on the merits, he should have appealed from the judgment originally entered, since the ruling on his motion is not normally appealable. The Supreme Court reversed.

Finally, *Foman v. Davis*, 371 U.S. 178 (1962) is apposite to the *Weaver* case. In *Foman*, the District Court entered judgment dismissing plaintiff's complaint on December 19, 1960. On December 20, 1960, plaintiff filed motions to vacate the judgment and to amend the complaint. While the motions were pending, the plaintiff on January 17, 1961, appealed from the judgment. On January 23, 1961, the District Court denied the motions and, on January 26, 1961, plaintiff appealed from the order of January 23, 1961 denying the motions. The Court of Appeals dismissed the appeal taken on January 17, 1961 as premature and then held the appeal of January 26, 1961 as ineffective for review of the judgment of December 19, 1969, because the notice of appeal failed to designate that judgment as well as the orders denying the motions.

This Court reversed, holding, inter alia, that the Court of Appeals had erred in holding that the notice of appeal was ineffective for the review of the original judgment by reason of the failure to designate the original judgment, reasoning as follows:

> "The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to

> appeal from the judgment sought to be vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the dismissal and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points on which she intended to rely on appeal, submitted to both respondent and the court pursuant to rule, similarly demonstrated the intent to challenge the dismissal." 371 U.S. at 229.

The Third Circuit has applied the *Foman v. Davis* rational in *United States v. Certain Land in City of Patterson*, 322 F.2d 866 (3d Cir. 1963) and *Paluch v. Erie Lackawanna R.R.*, 387 F.2d 906 (3d Cir. 1968). In the *Weaver* case, there were two notices of appeal of defendants, one cross-appeal by plaintiff, a statement of points which set forth, inter alia, the issue of retroactivity, full briefing and argument on the issues by both parties; there can be no doubt that Petitioner knew that the appeal of January 30, 1980, encompassed a challenge to all of the earlier orders. The law is also clear on this point. An appeal from a final judgment draws in question all prior non-final orders and all rulings which produced the judgment. *De Dampitan v. Administrator of Veteran Affairs*, 576 F.2d 708 (CA D.C. 1974).

C. THE DECISION OF THE COURT OF APPEALS WAS NOT ERRONEOUS AND UNJUST

Plaintiff contends that the Court of Appeals reversed the trial court judgment "even though it found that the trial court was correct with respect to the facts and the law of the case." Petition for Writ of Certiorari, Page 12. The Court of Appeals did not consider the trial court to have applied the law correctly as to the question of non-retroactivity of *Elrod*. Once the decision as to non-retroactivity was made, the Court of Appeals had to decide whether defendants' failure to raise timely the defense of non-retroactivity should bar the application of the defense. The Court of Appeals did acknowledge the fundamental procedural differences between *Marino* and *Weaver* as well as the similarity

of their situations and their claims for relief. That the latter was controlling is illustrated by the fact that the dissent of Judges Weis and Gibbon was based upon their conception that *Elrod* should be applied retroactively in both *Marino* and *Weaver* and not based upon any distinctions which they noted in the two cases. Appendix F, page 35a.

Petitioner fails to perceive that, without the failure of respondents to raise the issue of retroactivity prior to trial, he would not have had a day in court at all. The Court of Appeals considered the equities between the parties and, in effect, determined that these equities did not weigh more toward one side than the other. Therefore, the Court went beyond the individual equities and considered the similarity of the situation of both Weaver and Marino who were hired by the same municipal entity at approximately the same time by the same administration and fired at approximately the same time by a succeeding administration. The court obviously felt that the similarities were more significant than the procedural differences. Appendix F, page 33a.

That the Court of Appeals has the power to raise this issue is clearly described by the Court of Appeals in its citation of several cases in which it displayed inherent power to reach issues although not timely raised below. The Court of Appeals described this as an unusual instance and formulated its decision en banc accordingly. *Spicer v. Hilton*, 618 F.2d 232 (3d Cir. 1980); *Allen V. Aytch*, 535 F.2d 817 (3d Cir. 1976); *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84 (3d Cir. 1969), cert. denied, 396 U.S. 1046 (1970); *Lumbermens Mutual Casualty Co.*, 365 F.2d 802 (3d Cir. 1966), rev'd on other grounds sub nom *Provident Tradesmens Bank and Trust Co. v. Patterson*, 390 U.S. 102 (1968), are all cited by the Court of Appeals as illustrative cases in which it examined the merits of issues which were not timely preserved. Moreover, this Court affirmed inhearant power of the Federal Courts to consider legal issues when required by the interest of justice despite the failure of the parties to preserve them at trial in *City of Newport v. Fact Concerts, Inc.*, — U.S. — 101 S.C. 2748 (1981).

Petitioner further argues that the court applied two newly enunciated principles of law retroactively which Weaver could not anticipate. The principle of evenhandedness exists in every case as an ideal for the court and is not newly enunciated. It is a fundamental jurisprudential concept which has been often discussed in legal writings, an example of which follows:

> "It will not do to decide the same question one way between one set of litigants and the opposite way between another. If a group of cases involves the same client, the parties expect the same decision. . . Everyone feels the force of this sentiment when two cases are the same. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the evenhanded administration of justice in the courts." B. Cardozo, *The Nature of The Judicial Process* (1921), pages 33-34.

The second "Principal" which Petitioner argues has been applied retroactively is the defense of non-retroactively of *Elrod.* This certainly could have been anticipated by Petitioner and the issue of non-retroactively was briefed and argued before the Court of Appeals.

The Court of Appeals had no reason to consider other remedies once it decided that *Elrod* should not have retroactive application and that *Weaver* was not entitled to relief.

D. THIS COURT SHOULD NOT ISSUE A WRIT OF CERTIORARI TO DECIDE THE ENTITLEMENT OF ATTORNEYS' FEES TO A PARTY WHO PREVAILS TEMPORARILY UNDER CIRCUMSTANCES WHICH ARE NOT PART OF THE RECORD

The *Civil Rights Attorneys Fees Act of 1976,* 42 U.S.C. §1988 grants to a court the discretion to award attorneys' fees to the prevailing party in civil rights legislation. Weaver was the prevailing party at the trial court level but the defendants prevailed before the Court of Appeals.

It is true that defendants agreed to rehire Weaver without prejudice[2] pending the outcome of the appeal. An examination of the circumstances which this occurred is necessary.

Shortly after the appeals to the May 17, 1979 order by both plaintiff and defendant were remanded by the Court of Appeals on October 12, 1979, plaintiff filed a Motion for Compliance, Sanctions and Contempt. At this time, the motions by both plaintiff and defendants which were the basis for the remand were still outstanding in the trial court; on November 1, 1979 (one day after the filing of the Motion for Contempt by plaintiff), the District Court denied defendants' Motions, granted a rule to show cause why defendants should not be held in contempt and set a hearing date. While plaintiff's motions to amend the judgment were still outstanding[3] and Defendants' appeal was in abeyance, the trial court denied defendants' motion for a stay.[4] Thus, the defendants were caught in a "squeeze play" by the District Court which refused to decide Plaintiff's motions yet insisted that defendant's obey its non-final order at the risk of contempt proceedings.

With that scenario in mind and the agreement that such rehiring would be without prejudice, it is unbelievable that Weaver can claim that he is a temporarily prevailing party and, as such, is entitled to attorney's fees. No litigants would ever agree to an action without prejudice if the outcome were that attorney's fees would be awarded for such a temporary action.

Moreover, this Court should not consider this question because some of the circumstances of the agreement are not part of the record; petitioner is being less than candid by admitting the agreement to rehire without admitting that it was without prejudice.

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[2]The words "without prejudice" mean that neither party's ultimate position will have been altered and that neither party will be disadvantaged by the agreement. Plaintiffs' claim is a breach of the agreement.

[3]Both motions of plaintiff were not decided until November 27, 1979.

[4]Defendants filed two requests for a stay to the lower court. Both were denied. These matters are part of the original record but are not in the reproduced record or reflected in the appendix.

Attorney's fees are awarded to the prevailing party at the discretion of the court.[1] "Prevailing party" means the party who ultimately prevails; if petitioner's interpretation is adopted, each court in the ladder can award attorney's fees, so long as a litigant prevails at one stage of the proceeding, leaving the last court on the ladder to offset all of the different orders. This would not only be chaotic but unfair.

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[1] It should be noted that the Court of Appeals did consider the question of attorney's fees in their decision that defendants had to recompense Weaver for all court costs, exclusive of counsel fee, incurred in the district court post-trial proceedings. Appendix F, P. 34a.

THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER ELROD V. BURNS SHOULD BE APPLIED RETROACTIVELY

II.

Elrod was decided on June 26, 1976. Every circuit court which has considered the question has decided that *Elrod* should not have retroactive application. There is not only a lack of confusion between the circuits but there is complete agreement. Moreover, this court has previously denied certiorari for the consideration of the issue of the retroactive application of *Elrod*. *Aufiero v. Clarke*, 639 F.2d (1st Cir. 1981), cert. denied 101 S.Ct. 3052 (1981); *Ramey v. Harber*, 589 F.2d 753 (4th Cir. 1978), cert. denied 99 S.Ct. 2823 (1979). *Marino v. Bowers, et al* has not been appealed to this court. This issue was fully briefed and argued before the Third Circuit Court of Appeals in both this case and *Marino v. Bowers*.[4] 657 F.2d 1963 (3d Cir. 1981).

A. OWEN V. CITY OF INDEPENDENCE, MISSOURI IS NOT CONTROLLING

Plaintiff claims that the decision of this Court in *Owen v. City of Independence, Missouri*, 445 U.S. 622 (1980) mandates that *Elrod* be applied retroactively. Plaintiff's reliance upon *Owen* is misplaced since that case did not in any way deal with the question of retroactive application of a newly created constitutional right. Rather, in that case, a majority of the Supreme Court held that where a constitutional right has been violated, a remedy for that violation will not be denied by operation of a "good faith" immunity in favor of a municipal corporation. Had the court below held the *Elrod v. Burns* decision to be retroactive, but then denied plaintiff a remedy on the basis of

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[4]The issue was also briefed by both parties for the District Court; the District Court refused to consider the issue deeming it waived.

the assertion of a good faith immunity by defendant, the *Owen* case would be relevant.[7] However, this appeal is not concerned with whether a remedy is properly denied where a violation of a constitutional right has in effect been determined; rather, this case turns on whether the constitutional right itself existed in the first instance. To rely upon *Owen* where the question is whether a newly created constitutional right pre-existed the decision creating that right is to beg that very question.

The statement in *Owen* that financial losses, even where not foreseeable, should be borne by the municipality rather than the individual was clearly tied to the question of the defense which the municipality could assert. The Third Circuit specifically considered the interpretation of this statement in its *Marino* opinion and refused to give it the blanket application urged by both Marino and Weaver because to do so would obliterate the third factor in the *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971) test for retroactivity.[8] The municipal defendant would always be liable despite the particularities of each fact situation.[9]

Petitioner further argues that the Third Circuit was bound by the rule established in *Bradley v. School Board of City of Richmond*, 416 U.S. 714 (1974). In *Bradley*, this Court dealt with a change in the law which occurred while the case was on appellate review and directed that appellate courts are bound to apply the law existing at the time their decision is rendered unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. This rule is not controlling in *Weaver* because the basic question is not a change in the law which occurred during the appellate stages but a change in the

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[7] A further issue would then be involved because the County of Bucks is not a defendant in the present case. Weaver is suing Bowers, Metzger & Catania individually and in their respective capacities as commissioners.

[8] The third and final *Chevron* factor is "the inequity imposed by retroactive application." 404 U.S. at 107.

[9] Weaver argues that *Chevron* requires an examination of the equities between the parties to the lawsuit in question. Petition for Writ of Certiorari, page 24-25.

law which occurred prior to plaintiff's instituting suit but after the occurrence of the acts of which plaintiff complains. Indeed, it was this change in the law which formed the basis of plaintiff's suit. Thus, *Weaver* raises the issue of whether plaintiff should be given the benefit of retroactive application of the *Elrod* decision rather than the issue of whether plaintiff has failed to receive the benefit of a change in the law which occurred during appellate review.

B. THE THIRD CIRCUIT CORRECTLY APPLIED THE CHEVRON NON-RETROACTIVITY TEST TO DETERMINE THAT ELROD WAS NOT TO BE CONSIDERED RETROACTIVELY.

Plaintiff's argument is that all of the decisions of the three circuits which found *Elrod* to be non-retroactive are the result of a failure to apply properly the *Chevron* factors for retroactivity. First of all, this issue and the application of the *Chevron* factors was thoroughly briefed for the Third Circuit and discussed by them at considerable length in the *Marino* opinion (Appendix H of Petition for Writ of Certiorari). The opinion answers the contention that a ruling dealing with fundamental personal rights should never be limited to prospective application by citing a large number of cases in which the Supreme Court has held otherwise.

Plaintiff's last argument against the *Chevron* analysis as enunciated by the Court of Appeals is that the equities favored the plaintiff and the equities considered must be particular rather than general. In its *Marino* decision, the Third Circuit found the equities to point most persuasively toward prospective application because a new employee would be filling the desired position and would have to be removed and because the thousands of local government units might find it impossible to pay damages to persons fired before the *Elrod* decision. A further significant factor in considering the equities would be the reasonable expectation of a claimant who entered into employment by replacing another and accepting the favors of the system which he now claims is wrong. Weaver entered upon his

job by removing the patronage employee before him and could only have anticipated ceding his job to the patronage employee to follow him. The particular hardship to the county or the individual defendants in *Weaver* is not a part of the record and therefore cannot be considered. Moreover, the statement made by Petitioner that "in fact, the employee he replaced was transferred to an existing vacancy in another department without financial loss to the county or to the employee involved" (Petition for Certiorari, page 25) is not only without basis in the record; it is without foundation in fact.

In *Keyishian v. Board of Regents*, 385 U.S. 589 (1966) the Court held that a public university faculty member could not be discharged for membership in the communist party. In *Elfbrandt v. Russell*, 384 U.S. 11 (1965), the Court held that public employment could not be conditioned upon the requirement of an oath denying membership in the communist party or any organization advocating the overthrow of the state government. In his reliance upon *Keyishian* and *Elfbrandt*, Weaver ignores the crucial differences between his situation and theirs. Weaver was hired as a public employee solely because he belonged to a particular political party and fired allegedly because he belonged to the same political party. His initial employment was obtained as a result of his belonging to a particular political party and he does not now argue that his initial employment should not have been so conditioned; he was content to pick the fruits but complains because the bush has become bare.

Petitioner further claims that the Third Circuit failed to consider the particular equities between the parties to this suit as required by the third *Chevron* factor. Plaintiff is ignoring that part of the opinion in which the Third Circuit discusses the particular equities as follows:

> "Viewing the equities from Weaver's perspective, defendant's failure to raise the claim in a timely fashion obliged Weaver to expend the effort and expense of the trial and numerous post-trial motions which might have been avoided had the claim of non-retroactivity been presented to the District Court and been decided favorably to defendants. On the other

> hand, we cannot ignore the somewhat ironic fact that because defendants failed to raise this claim, Weaver was able to succeed on the merits and as a result has been re-employed by defendant since November of 1979, a job he otherwise would not have had."

Appendix F, pages 32a-33a. Had the question of non-retroactivity been raised initially, Weaver's case would have had the exact same results of that of Marino at an earlier time and he would never have been rehired even on a temporary basis. Plaintiff has been employed pending the appeal which reinstatement was agreed upon without prejudice by all parties. Moreover, the Third Circuit directed that Weaver's post-trial costs in District Court and the Court of Appeals be paid by defendants. Appendix F, page 34a. The decision of the Third Circuit Court of Appeals indicates that the individual equities were considered and balanced; because of the equivalence of the individual equities, the court did not consider those equities controlling.

CONCLUSION

Respondents Bowers, Metzger and Catania request this Honorable Court to deny certiorari to review this case.

Respectfully submitted,

BY: _____

DAVID H. MOSKOWITZ
Attorney for Respondents

CERTIFICATE OF SERVICE

I, David H. Moskowitz, Esquire, Attorney for Respondent, do hereby certify that three copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari and Appendix were served by United States mail, postage prepaid, first class on January 6, 1982 address to Ronald J. Smolow, Neshaminy Plaza II, Suite 105, Cornwells Heights, PA 19020, I further certify that all parties required to be served in this appeal have been served.

DAVID H. MOSKOWITZ, ESQUIRE
Attorney for Respondent

Appendix

APPENDIX A

PART V. JURISDICTION ON WRIT OF CERTIORARI

Rule 17. Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

[Cross-reference: ¶400.05 (methods of review); ¶400.05-2 (effect of the grant or denial of a petition for writ of certiorari); §1254(1) (certiorari to courts of appeals; ¶434.01); §1255(1) (to Court of Claims; ¶442.01); §1256 (to Court of Customs and Patent Appeals; ¶452.01); ¶461.01[1] (to the Special [Rail] Court); ¶461.02[2] (to the Temporary Emergency Court of Appeals); §1257(3) (certiorari to state courts; ¶¶505.01, 508.01-513.01); §1258(3) (to Supreme Court of Puerto Rico; ¶¶523.01)]